Borden Chemical, a Division of Borden, Inc. *and* International Chemical Workers Union, Local No. 733, AFL-CIO. Case 32-CA-551

April 9, 1982

DECISION AND ORDER

On April 25, 1979, Administrative Law Judge Maurice M. Miller issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed an anwering brief. Respondent additionally filed a request for oral argument. On December 10, 1979, the Board, having determined that this and other cases[1] involving an employer's obligation to furnish certain information regarding health and safety-related data to the collective-bargaining representative of its employees presented issues of importance in the administration of the National Labor Relations Act, as amended, scheduled oral argument for January 16, 1980. Thereafter, oral argument was rescheduled to January 15, 1980, at which time Respondent, the General Counsel, the Charging Party, International Chemical Workers Union, Local No. 733, AFL-CIO (hereinafter also called Local No. 733 or the Union), and *amici curiae* presented arguments.[2] The General Counsel and the Charging Party subsequently filed supplemental memorandums of law on the legislative history of the Act regarding trade secrets and confidentiality and Respondent filed a memorandum in reply.[3]

The Board has considered the record and the attached Decision in light of the exceptions, briefs, and oral arguments, and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge to the extent consistent herewith.

The question here is whether Respondent violated Section 8(a)(5) and (1) of the Act by refusing, as requested, to furnish the Union with a complete list of raw materials and chemicals purchased, stored, and processed at its Fremont, California, plant.[4] The Administrative Law Judge found that the data sought is relevant to the Union's representational functions. He also found that there was no merit to Respondent's asserted defenses for refusing to provide a list containing such data, including its claims that no request was made within the 10(b) period; that the Union was required to seek the list through the contractually provided Health and Safety Committee procedures; that the information sought was available to the Union through alternative sources; and that the Union waived its right to, or conceded its need for, the list. For reasons set forth by the Administrative Law Judge we agree with these findings.

Respondent additionally claimed, however, that it was relieved of any obligation to satisfy the Union's information request because the requested list would contain data of a confidential, proprietary, and trade secret nature which Respondent had a legitimate business need not to disclose. The Administrative Law Judge, while conceding that certain of the requested information was of a confidential, proprietary, and trade secret nature, found nevertheless that Respondent had failed to establish, as he found it must to support this defense, that release of the information to the Union would result in "a certain risk of disclosure to its [Respondent's] business competitors." The Administrative Law Judge therefore found that by failing to provide *all* of the requested information, including that of a confidential nature, Respondent violated Section 8(a)(5) and (1) of the Act.

We agree with the Administrative Law Judge's conclusion that by refusing to provide the Union with a list of "materials and chemicals" which concededly would not compromise its proprietary advantage Respondent violated Section 8(a)(5) and (1) of the Act. Contrary to the Administrative Law Judge, however, we find that Respondent's asserted justification with respect to alleged or established proprietary, confidential, or trade secret information appears, at least on its face, to raise legitimate and substantial company interests possibly requiring a finding that Respondent need not disclose the information, or at least not unconditionally disclose it.

Respondent's assertion, that since the requested materials and chemicals list "contains" highly confidential, proprietary, and trade secret information disclosure of the entire list is privileged,[5] is without

[1] *Minnesota Mining and Manufacturing Company*, 261 NLRB 27 (1982); and *Colgate-Palmolive Company*, 261 NLRB 90 (1982).

[2] The American Federation of Labor and Congress of Industrial Organizations and its Building and Construction Trades and Industrial Union Departments presented oral argument as *amici curiae*.

[3] We find nothing in the legislative history of the Labor Management Relations Act of 1947, as cited, which would indicate that Congress ever contemplated the question whether an employer, upon request, should be obligated to furnish a collective-bargaining representative with information regarding proprietary or trade secret ingredients. We therefore find no basis for concluding that the findings made *infra* either ignore or override the legislative history of the Act.

[4] The Fremont facility consists of two subdivisions, the Adhesive & Chemicals—West (hereinafter also called AC West), which produces a substantially diversified product line of resins, adhesives, and formaldehyde formulations, and the Printing Ink Division, which produces a variety of printing inks, primarily for manufacturers of packing materials.

[5] To the extent that Respondent contends that each of the individual formulas and production processes used at both AC West and the Printing Ink Division are highly confidential, proprietary, and trade secret in nature, we note that the Union has at no time relevant hereto requested either formulas or production process information.

merit. That the list, if furnished, would contain some materials or chemicals which are alleged to or do constitute trade secrets does not excuse Respondent from complying with the request to the extent that it includes information as to which no adequate defense is raised.[6] Accordingly, having adopted the Administrative Law Judge's finding that the requested list of raw materials and chemicals is relevant to the Union's representational functions,[7] we find that Respondent breached its collective-bargaining obligation when it refused to provide the Union with a list of the substances requested which concededly would not compromise any proprietary advantage, and therefore violated Section 8(a)(5) and (1) of the Act. We shall therefore order Respondent to turn over to the Union a list of those raw materials and chemicals purchased, stored, and processed at its Fremont, California, plant as to which Respondent asserts no trade secret defense.[8]

With respect to those substances which Respondent claims constitute confidential trade secret information, however, we shall, in accord with our decision in *Minnesota Mining and Manufacturing Company, supra*,[9] issued today, and the procedure set forth therein, give the parties themselves an opportunity, through collective bargaining, to reach some agreement viewed satisfactory by both regarding conditions under which the needed information may be furnished to the Union with appropriate safeguards protective of Respondent's proprietary interests.[10] Consequently, we shall not resolve that aspect of the instant proceeding that relates to the disclosure of asserted confidential trade secret information unless and until it is shown that the collective-bargaining process has not achieved resolution of the matter.[11]

In so doing we recognize, as we indicated in *Minnesota Mining and Manufacturing Company, supra*, that if the Union and Respondent are unable to reach agreement on a method whereby their respective interests would be satisfactorily protected these parties may be before us again. If the issue of whether the parties have bargained in good faith is presented to us, we will, of course, look to the totality of the circumstances in determining whether both have bargained in good faith.[12] If necessary, we shall undertake the task of balancing the Union's right of access to data relevant to collective bargaining with Respondent's expressed confidentiality concerns in accordance with the principles set forth in *Detroit Edison Co., supra*. However, we believe that first allowing these parties an opportunity to adjust their differences best effectuates the National Labor Relations Act policy of maintaining industrial peace through the resolution of disputes by resort to the collective-bargaining process.[13]

In summary, we find that Respondent violated Section 8(a)(5) and (1) of the Act by failing to supply the Union with the requested raw materials and chemicals list to the extent such data does not include confidential trade secrets. Insofar as Respondent avers that supplying the bargaining agent with the information sought would compromise the confidentiality of proprietary information, we first rely on the collective-bargaining process and the good-faith negotiations of the parties to determine conditions under which information may be furnished to the Union while maintaining appropriate safeguards to protect Respondent's legitimate interests. We shall therefore order Respondent to supply to the Union the former information, and to bargain in good faith with regard to the latter information.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent,

[6] *Minnesota Mining and Manufacturing Company, supra*, 31-32; *Fawcett Printing Corporation*, 201 NLRB 964 (1973).

[7] See *Minnesota Mining and Manufacturing Company, supra*, 29, and *Colgate-Palmolive Company, supra*, for further discussion.

[8] Respondent made no estimate as to how many of the some 500 different raw materials and chemicals used at AC West and the 350 raw materials and 350 intermediate chemical compounds used at the Printing Ink Division might constitute trade secrets. However, as more fully discussed by the Administrative Law Judge, Respondent has attached the trade secret designation to a number of raw materials the discovery of which it claims would damage its competitive edge. While there may be substances in addition to those specifically referred to which may legitimately be exempted from disclosure pursuant to the Order herein, we will most carefully scrutinize any number of materials and chemicals substantially at variance with the evidence herein adduced by Respondent.

[9] In that case, we recognized that, in considering a union's request for relevant but assertedly confidential information, it may become necessary, as envisioned by the Supreme Court in *Detroit Edison Co.* v. *N.L.R.B.*, 440 U.S. 301 (1979), to balance the union's need for such information against any "legitimate and substantial" confidentiality interests established by the employer, accommodating the parties' interests, insofar as feasible, in determining the employer's duty to supply the information. We concluded, however, that before undertaking the task of fully balancing the various countervailing rights of the parties they should first attempt to develop the necessary methods and devices for the information exchange through the traditional collective-bargaining mechanism.

[10] We note that the parties have for some years enjoyed an apparently amicable bargaining relationship which has included consideration of health and safety related matters. Thus, the climate for reaching such an agreement is favorable.

[11] This is not, however, to avoid resolution of the controversy before us, for Respondent has not heretofore acknowledged that information of the kind sought by the Union is relevant to the latter's collective-bargaining functions absent some specific grievance or controversy. We find that it is.

[12] *Rhodes-Holland Chevrolet, Co.*, 146 NLRB 1304 (1964). Substantiation of various positions asserted by the parties would, obviously, be an important element of any such evaluation.

[13] Accordingly, we find it unnecessary at this time to reach or pass upon the Administrative Law Judge's analysis or application of the criteria to be applied in any such balancing process.

Borden Chemical, a Division of Borden, Inc., Fremont, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with International Chemical Workers Union, Local No. 733, AFL-CIO, as the exclusive bargaining representative of its employees, by refusing to furnish a complete list of raw materials and chemicals stored, handled, and processed within its Fremont, California, plant to the above-named Union or its designated representatives, except for those substances the names of which constitute proprietary trade secrets.

(b) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action, which is necessary to effectuate the policies of the Act:

(a) Furnish Local No. 733, or its designated representatives, with the requested raw materials and chemicals list described in paragraph 1(a) above.

(b) Upon request, bargain collectively in good faith with Local No. 733, or its designated representative, regarding its request for the furnishing of a list of raw materials and chemicals stored, handled, and processed within its Fremont, California, plant, insofar as the request relates to items which are proprietary trade secrets, and thereafter comply with the terms of any agreement reached through such bargaining.

(c) Post at its Fremont, California, plant copies of the attached notice marked "Appendix."[14] Copies of said notice, on forms provided by the Regional Director for Region 32, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 32, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

MEMBER JENKINS, concurring in part and dissenting in part:

Contrary to my colleagues, I would require Respondent to furnish to the Union a complete list of raw materials and chemicals purchased, stored, and processed at its Fremont, California, plant. See my separate opinion in *Minnesota Mining and Manufacturing Company*, 261 NLRB 27 (1982).

MEMBER HUNTER, concurring:

I concur in this Decision consistent with the views expressed in my separate opinion in *Minnesota Mining and Manufacturing Company*, 261 NLRB 27 issued this day.

[14] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively with International Chemical Workers Union, Local No. 733, AFL-CIO, as the exclusive bargaining representative of our employees, by refusing to furnish a complete list of raw materials and chemicals stored, handled, and processed within our Fremont, California, plant to that labor organization or its designated representatives, except for those substances the names of which constitute proprietary trade secrets.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act, as amended.

We will, upon request, furnish to International Chemical Workers Union, Local No. 733, AFL-CIO, or its designated representative, a complete list of raw materials and chemicals stored, handled, and processed within our Fremont, California, plant, except for those substances the names of which constitute proprietary trade secrets.

WE WILL, upon request, bargain collectively in good faith with the above-named Union, or its designated representative, regarding its request for the furnishing of a list of raw materials and chemicals stored, handled, and processed within our Fremont, California, plant, insofar as the request relates to items which are proprietary trade secrets, and thereafter comply with the terms of any agreement reached through such bargaining.

BORDEN CHEMICAL, A DIVISION OF BORDEN, INC.

DECISION

STATEMENT OF THE CASE

MAURICE M. MILLER, Administrative Law Judge: Upon a charge filed on November 22, 1977, and duly served, the General Counsel of the National Labor Relations Board caused a complaint and notice of hearing, dated February 6, 1978, to be issued and served on Borden Chemical, a Division of Borden, Inc., designated as Respondent within this Decision. Therein, Respondent was charged with the commission of unfair labor practices within the meaning of Section 8(a)(1) and (5) of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 88 Stat. 395. Respondent's answer, duly filed, conceded certain factual allegations within the General Counsel's complaint, but denied the commission of any unfair labor practice.

Pursuant to notice, a hearing with respect to this matter was held on May 9 and 10, 1978, in Oakland, California, before me. The General Counsel and Respondent were represented by counsel. Each party was afforded a full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence with respect to pertinent matters. Since the hearing's close, briefs have been received from the General Counsel's representative and Respondent's counsel; these briefs have been duly considered.

Upon the entire testimonial record,[1] documentary evidence received, and my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent raises no question herein with respect to the General Counsel's jurisdictional claims. In that connection, the General Counsel's complaint, conjoined with Respondent's formed reply, warrants determinations: that Respondent firm, Borden Chemical, a Division of Borden, Inc., is a New Jersey corporation with its principal place of business located in Columbus, Ohio; that the Adhesives & Chemicals-West, Division of Borden Chemical maintains a Fremont, California, facility, where it is engaged in the manufacture and nonretail sale of chemicals and related products; and that, during the 12-month period preceding the complaint's issuance, Respondent sold and shipped goods and services valued in excess of $50,000 from its Fremont, California, facility directly to out-of-state customers. Respondent herein was, throughout the period with which this case is concerned, and remains, an employer within the meaning of Section 2(2) of the Act, engaged in commerce and business operations which affect commerce within the meaning of Section 2(6) and (7) of the statute. Further, with due regard for represently applicable jurisdictional standards, I find assertion of the Board's jurisdiction, in this case, warranted and necessary to effectuate statutory objectives.

[1] On p. 267 of the record transcript, line 18, the word "anachronism" should read "acronym."

II. COMPLAINANT UNION

International Chemical Workers Union, Local No. 733, AFL-CIO, designated as Complainant Union within this Decision, is a labor organization within the meaning of Section 2(5) of the Act, as amended, which admits certain of Respondent's employees to membership.

III. UNFAIR LABOR PRACTICES

A. *Issues*

Simply paraphrased, the General Counsel's complaint, herein, raises a single question: Did Respondent refuse to bargain collectively, in good faith, with Complainant Union herein, when the firm's management refused to provide Complainant Union with a complete list of those raw materials and chemicals which Respondent purchases, stores, and processes within its Fremont, California, facility? Respondent contends that its conceded refusal to provide the requested list should, nevertheless, not be considered a refusal to bargain, statutorily proscribed.

More particularly, with respect to the General Counsel's general charge, Respondent proffers multiple defenses. *First*, Respondent claims that Complainant Union's request had, initially, been presented more than 6 months before its unfair labor practice charge, herein, was filed; the firm's counsel contends, therefore, that the General Counsel's complaint should be considered time-barred. *Second*, Respondent denies any statutory duty to provide the requested list since Complainant Union was seeking information which cannot, properly, be considered relevant with respect to its bargaining representative functions. *Third*, Respondent contends that—should the requested list, nevertheless, be considered relevant to Complainant Union's discharge of collective-bargaining responsibilities—disclosures covering the data requested should not be considered required:

> . . . because of its confidential, proprietary and trade secret nature, and the employer's legitimate business needs that the information not be disclosed . . . .

Fourth, Respondent claims that—should the data requested be considered both relevant to Complainant Union's bargaining representative functions and disentitled to claim protection from disclosure as proprietary or trade secret information—representatives of Complainant Union have, nevertheless, "clearly and unmistakeably" waived their right to request such data, during prior collective-bargaining negotiations which produced a contractual consensus. Further, Respondent contends that its collective-bargaining contract with Complainant Union, currently in force, provides comprehensive procedures pursuant to which "health and safety" problems within Respondent's Fremont facility can be raised, researched, and resolved; that their contract's relevant provisions defined a patently "exclusive method" whereby disputes with regard to health and safety matters should be settled; that Complainant Union has, nevertheless, failed to proffer to pursue its request for a list consistently with

such contractually defined procedures; and that Complainant Union's refusal-to-bargain charge should, therefore, be considered—currently—premature. *Finally*, Respondent's counsel suggests that the General Counsel's complaint should be considered barred, since Complainant Union has neither pursued its chemical "list" request through contractually defined grievance/arbitration procedures nor protested the conceded refusal of Respondent's management to provide the data requested, through such contractual procedures.

B. *Facts*

1. Background

a. *Respondent's business*

(1) Corporate structure and product lines

Borden, Inc., Respondent's parent corporation, maintains a multinational business enterprise, with diversified product lines, composed of several corporate divisions. These divisions operate some 275 plants within this country, together with some 200 additional facilities worldwide.

Respondent herein, Borden Chemical, a Division of Borden, Inc., maintains its principal place of business in Columbus, Ohio; *inter alia*, the firm operates a Fremont, California, facility, wherein various chemical products are manufactured. Respondent functions, within its Fremont facility, through two subdivisions. Adhesive & Chemicals—West, designated AC West hereinafter, produces a substantially diversified product line of resins, adhesives, and formaldehyde formulations. The firm's Printing Ink Division produces a variety of printing inks, primarily for manufacturers of packaging materials.

Both of Respondent's designated divisions manufacture products which require various combinations of chemicals and raw materials; these are routinely received, stored, and processed within the firm's Fremont facility. Considered in totality, the record herein warrants a determination—which I make—that AC West's products, manufactured there, require "plus or minus" some 500 different types of chemicals and raw materials. The firms' Printing Ink Division, likewise, processes some 350 different raw materials, plus probably 350 previously processed "intermediate" chemical compounds.

(2) Management

Throughout the period with which this case is concerned, Works Manager Otto Sanberg functioned as Respondent's AC West Division head, within the firm's Fremont plant. Concurrently, within that facility, Respondent's Printing Ink Division maintained functionally separate manufacturing operations, with Plant Manager Richard Palmer designated as the division's responsible head.

Respondent's parent corporation, Borden, Inc., currently provides staff services, for divisional managers, within several fields of corporate concern. For present purposes, we must consider herein two Borden, Incorporated, department heads. Throughout the period with which this case is concerned Director of Labor Relations Jack McInerney headed Borden, Incorporated's labor relations staff; he was responsible for contract negotiations, arbitration procedures, and collective-bargaining contract administration generally. Concurrently, Toshio Mekaru, the firm's director of industrial health, supervised a staff industrial hygienist, some 11 regional hygienists who provided their services pursuant to contract, and 3 consultants, responsible for the establishment of whatever "policies, procedures, guidelines" management might consider necessary or desirable for the protection and safety of Borden, Inc., workers.

b. *Health and safety within Respondent's plants*

(1) Health and safety procedures

Considered in totality, the present record will—within my view—support a determination that Respondent's management has, routinely, concerned itself seriously with the preservation of health and the promotion of safety, within its various plants.

Some years ago, Respondent's management created an environmental concerns committee; that committee was charged with dual responsibilities. Primarily, committee members were requried to review Respondent's complete "finished goods" product line, to determined whether such company products might generate environmental problems, create difficulties for customers, or present potential health or safety hazards within Respondent's plants. Concurrently, the committee was required to review AC West's chemical raw materials, to determine whether their utilization, within Respondent's plants, presented potential hazards. With respect to chemicals deemed hazardous, which could not be completely "eliminated" from Respondent's manufacturing processes, the committee members sought to develop control devices and procedures calculated to reduce worker "exposure" within work places to presumptively "acceptable" levels.

In connection with these programs, concerned with chemical raw materials processed within Respondent's plants, the committee developed certain hazard "code" designations. Three types of hazard—specifically, health, fire, and reactivity risks—were considered. Within each designated category, degrees of hazard, which particular chemical raw materials might present, were defined. Based on these determinations, Respondent's chemical raw materials were given letter "code" ratings—ranging from "A" through "D" specifically—whereby they were designated as extremely hazardous, moderately hazardous, slightly hazardous, or practically harmless. Materials so rated, with respect to their hazard potential, were—further—given matching precautionary designations; their containers were marked "Danger," "Warning," or "Caution," respectively. Chemicals which were deemed harmless were left unmarked. Thereafter, color-coded signs—purportedly descriptive of Respondent's four-step hazard code sequence with respect to differentiated health, fire, and reactivity risks—were posted throughout Respondent's various plants, particularly within specific "work areas" where Respondent's management considered such hazard reminders necessary.

Concurrently, Respondent's management developed, and continues to refine, control devices, practices, and procedures, whereby chemical raw materials may safely be "handled" within the firm's various plants, related to their known or predetermined hazard potential. In this connection, Borden, Incorporated's director of industrial health, staff hygienists, and consultants consider the specific risks presumptively associated with Respondent's required utilization of certain chemical raw materials.

Their determinations, with respect to some particular chemical's conceivable hazard potential, normally, derive from subsidiary determinations with respect to *where* the chemical may be handled or processed, the *quantities* normally handled, the *frequency* of its usage, the form and manner of its use, and—more particularly—whether workers handle such a chemical directly or merely within some "enclosed" plant system. Data with respect to these several matters—whether derived from studies by Borden, Incorporated's hygienists or provided by Respondent's production personnel—make possible consequential determinations, with respect to whether a plant hygiene problem exits.

While a witness, Director of Industrial Health Mekaru testified—credibly and without contradiction—that Respondent's workers may, conceivably, confront "exposure" risks from whatever chemicals they handle, through inhalation, physical ingestion, or skin contact. Whenever such contacts generate a hazard potential, some control measures must be devised to prevent, or minimize, their possibly harmful consequences. *Inter alia*, such measures may compass Respondent's development of protective "engineering" controls, machinery installations calculated to provide specific work areas with more effective ventilation, or personal respirators provided for particular workers; further, such workers may be required to wear protective clothing, and comply with prescribed "work practice" procedures. Safety precaution bulletins—which detail certain "mandatory" work practice rules, personal protective measures, and hazardous exposure reporting requirements—will, sometimes, be posted within particular work areas, where potentially hazardous materials must be handled.

In this connection, Director of Industrial Health Mekaru's testimony, which I credit in this connection, warrants determinations that this departmental staff normally designates and locates—within Respondent's plants—those chemicals which present the highest life-threatening hazard potential; with respect thereto—specifically, with respect to known or suspected carcinogens—Respondent's compliance with governmentally defined worker protection standards, whenever such standards have been promulgated, must be maintained. Further, Respondent's hygienists, then, considered their firm's next most serious order of potentially toxic materials; specifically, those which could generate some permanent noncancerous damage within particular body organs, or cause some transient, treatable disease. When procedures have been developed which can prevent or minimize these "most critical" hazards, Mekaru claims, lesser hazards of the same type will, necessarily, be likewise controlled. While a witness, Borden, Incorporated's director of industrial health declared that:

> [You] cannot set up separate procedures for each chemical when you have 5,000 chemicals . . . . You protect against the most critical one that has the most severest health index and keep that under control and everything else falls in a lesser category, your *de minimis*. You protect against the worst case, the worst possible, the rest fall in, because they are handled the same way.

Within his brief, Respondent's counsel contends that, throughout his client's various plants, production processes and protective procedures have been developed, calculated to maintain "the highest level of health and safety in the work place" consistent with a high rate of production for quality finished products. Counsel's broadly stated claim may, conceivably, be debatable; upon this record, however, determination seems warranted—clearly—that it does reflect Respondent's managemental goal.

(2) Production management

Within Respondent's Fremont, California, facility, most products—except for various formaldehyde formulations—are manufactured in batches. Orders, when received, are routinely "written up" for production purposes. These written orders, *inter alia*, specify whatever procedures and chemical raw materials fulfillment of the order will require. Required materials, normally, are designated by Respondent's special code numbers. In Respondent's AC West Division, these writeups are designated manufacturing orders; such orders will, normally, list required materials with their generic, common, or trade name.

Within Respondent's Printing Ink Division, written orders are designated batch tickets; they normally list required materials solely by their code numbers. Fremont plant workers must locate required containers, with such "code" materials, within Respondent's storage facility. Those chemical material containers, when located, will bear their supplier's name, together with the material's trade name or generic designation. Plant Manager Palmer's testimony, which I credit in this connection, warrants a determination that some 70 percent of his Printing Ink Division's raw material supplies carry "trade name" designations merely; their containers show no generic or common chemical nomenclature.

Manufacturing orders and batch tickets are routinely posted, within Respondent's plant. When posted, Respondent's AC West manufacturing orders, further, carry relevant "hazard code" designations, with respect to whatever raw materials they list. Printing Ink Division raw materials, when located within Respondent's storage facilities, will normally be found in containers which bear health or safety "warning" labels or precautionary directives. Respondent's workers, within both divisions, have been directed to follow required or recommended safety precautions—whenever they must work with hazardous materials—consistent with their specific "hazard code" designation, or Respondent's regularly prescribed "work practice" procedures.

2. Contract negotiations

a. *Contract parties*

For some years—never designated, precisely, within the present record—Complainant Union and Respondent have maintained a collective-bargaining relationship, within Respondent's Fremont, California, plant. Between 1973 and 1976, that relationship was memoralized with a collective-bargaining contract which Jerome Levine, representing Complainant Union's parent International, had helped negotiate.

Shortly after April 1, 1976, Otto Sandberg, Respondent's AC West works manager, received a letter, typed on International Chemical Workers Union letterhead stationery, which had presumably been dispatched on that date. Therein, the International Union's vice president, Arthur Wood, notified Respondent's Fremont works manager that, within a few weeks, the "Union" would serve Respondent with a formal notice "opening" their expiring collective-bargaining contract for negotiations.

b. *Complainant Union's demands*

Preliminarily, within Vice President Wood's letter, Works Manager Sandberg was requested to provide the International Chemical Workers Union with certain required information. Among other things, the International Union's vice president requested a list compassing "all materials and chemicals" which Fremont plant union members handled, designated by their "trade" or "code" names and by their generic chemical names.

Works Manager Sandberg, subsequently, forwarded Vice President Wood's letter to Jack McInerney, then Borden, Incorporated's concerned area labor relations manager, who would be Respondent's prime spokesman throughout prospective collective-bargaining contract negotiations. The labor relations manager—so his testimony which I credit in this connection shows—complied most of the information which Vice President Wood had requested, before such contract negotiations began; he did not, however, prepare the requested list.

c. *Contract negotiations*

On May 20, 1976, Labor Relations Manager McInerney, together with three representatives of Respondent's Fremont management, conferred with Complainant Union's negotiators. International Representative Levine, together with a five-member Local 733 committee, comprised Complainant Union's group. At the outset, with various ground rules for their prospective sessions settled, Levine requested the specific information which Vice President Wood had previously solicited; McInerney proffered a document which, however, did not compass the requested "materials and chemicals" list. Complainant Union's spokesman questioned Respondent's omission; McInerney queried him, responsively, with regard to Complainant Union's need. Levine replied—so McInerney testified—that Complainant Union would present some health and safety proposals during the negotiations, and needed the requested list to negotiate effectively.

When this case was heard, the General Counsel's representative reported Levine's then current physical disability; the General Counsel could not produce his testimony. Since McInerney's proffered recollections, therefore, have been neither challenged, contradicted, nor put to test by comparison with Levine's testimonial recitals, I have scrutinized the labor relations manager's presentation with particular care. With respect to Levine's purportedly proffered justification for Vice President Wood's prior list request, McInerney's testimony—within my view—merits credence, so far as it goes. Subsequently, within this Decision, some further testimony—with regard to Complainant Union's proffered justification for a list request—will be considered.

Borden, Incorporated's labor relations manager, I find, vouchsafed a four-fold reply. *First*, he described Respondent's regular plant practices, pursuant to which specific health and safety problems presented within a workplace, solely, have been considered. *Second*, he declared his failure to comprehend how Complainant Union's requested list, *per se*, could help resolve specific health and safety problems. *Third*, he noted that Respondent's management "probably" had no "materials and chemicals" list ready for presentation. *Fourth*, he declared that he could not, in any event, provide the requested list because certain "proprietary" data would be, thereby, necessarily revealed. With matters in this posture, McInerney ultimately suggested that negotiations should proceed; he promised that he would check further to determine whether Respondent's management did have a complied list and—likewise—whether such a list could be provided. Complainant Union's substantive contract demands were then presented; *inter alia*, Complainant Union demanded yearly physical examinations for Fremont plant workers, together with a comprehensive "Occupational Health and Safety" clause, newly drafted.

On May 27, when International Representative Levine reiterated Complainant Union's list request, McInerney reported that no complied "materials and chemicals" list was available; further, he characterized the data which such a list would provide, once more, as proprietary in nature. Respondent's willingness to discuss *particular* health and safety problems, but solely with respect to specific "individual" situations, was reported. When Levine reiterated his prior declaration, that he needed the requested list to negotiate effectively, McInerney suggested that Complainant Union's request should be set aside temporarily.

On June 10, during their third session, neither Respondent's representatives nor Complainant Union's negotiators sought to discuss health and safety questions. The following day, however, Complainant Union's prior demand for yearly physical examinations, together with its comprehensive health and safety proposal, was reached for discussion. McInerney's testimony—which I credit in this particular connection—warrants a determination that Complainant Union's negotiators became quite "emotional" while presenting their several points of view. Borden, Incorporated's labor relations manager suggested, finally, that his firm's director of industrial health should be requested to join their contract talks.

With matters in this posture, the negotiations were recessed.

On June 21, when contract talks were resumed, Director of Industrial Health Mekaru provided Complainant Union's representatives with a comprehensive exposition; he recapitulated Respondent's reaction to their health and safety concerns. During his remarks, so McInerney testified, Mekaru commented, specifically, that "just a list of chemicals by and of themselves" would not, within his professional view, help Fremont plant workers. When Respondent's labor relations manager noted that Mekaru's detailed presentation had been well received, he declared that, when their next bargaining session convened:

> We have a proposal for them, a comprehensive proposal covering all of the health and safety items. . . .

McInerney promised that such a proposal would be drafted between sessions. With matters in this posture, the negotiators continued to discuss Complainant Union's further noneconomic demands, during further June 22 and 23 bargaining conferences.

On June 28, Borden, Incorporated's labor relations manager notified Complainant Union's negotiators that Respondent had prepared a written "comprehensive" proposal, with respect to health and safety matters, which Mekaru would present. In this connection, so McInerney testified, Complainant Union's spokesmen were told Respondent's proposal was being presented to settle "all of the outstanding items" regarding safety and health:

> . . . the feeling being that at this point, that was about as far as we were going to go and if it wasn't acceptable to the Union, if the Union, for example, were to hang tight for a listing of chemicals, or visitation or some of these other things, there would be no contract.
>
> * * * * *
>
> Q. (By Judge Miller) Mr. McInerney, I believe you testified that in the June 28th session, when you presented the Company's proposal . . . you expressed the Company's view that this article, if it became part of the contract, would dispose of all pending questions relating to health and safety? . . . Was there any reaction from the Union negotiators to your statement, or did they just let it stand without comment?
>
> A. They let it stand. . . .

With repect to McInerney's proffered recollection, however, the present record reflects testimonial conflict. Previously, when queried with respect to the June 28 developments, Dennis Ford, Complainant Union's president, had recalled no comments, proffered by Respondent's principal spokesman, calculated to characterize Respondent's proposal. Ford's testimony reads:

> Q. (By Mr. Tichy) And isn't it a fact that, about the middle of the negotiations, that the Company proposed a health and safety clause to resolve all outstanding health and safety issues?
>
> A. It wasn't proposed for that purpose . . . .
>
> Q. Isn't it a fact that, about mid-way through the negotiations, that the Company proposed a health and safety clause to resolve all outstanding health and safety issues?
>
> A. It wasn't to resolve all outstanding health and safety issues. It was something that we negotiated for in the contract. . . . It was with the help of the Company, the writing of it.
>
> Q. And isn't it a fact that, at the meeting in which this particular clause was presented, that Mr. McInerney said that this was to resolve all outstanding health and safety issues?
>
> A. I don't recall him saying that.
>
> Q. Isn't it a fact, Mr. Ford, that the Union has considered that, at all times when this issue of materials and chemicals has been raised, that it is a negotiable subject? . . .
>
> A. That is how we interpreted it because that's where we went full force with it as far as part of our negotiations.
>
> Q. Isn't it a fact, as you say, you did go full force over this negotiable subject during negotiations, and you came up with a health and safety clause, isn't that right?
>
> A. That wasn't a result of the chemical list. We didn't negotiate. We did not bargain to drop the list for that article in the contract . . . . We were still after the list.

Subsequently, herein, this testimonial conflict will be considered, further. Without regard, however, for whatever prefactory remarks, McInerney may purportedly have proffered, the record—clearly—warrants determinations: That, pursuant to his suggestion, Mekaru did present Respondent's written "Health and Safety" proposal; that Complainant Union's negotiators then caucused to consider Respondent's draft; and that, within a comparatively short time, they reported Complainant Union could "live with" Respondent's proposal, with certain minor language changes. Complainant Union's requested changes were made.

Respondent's proposal, which ultimately became article XVIII within the parties' negotiated 1976–79 contract, memorialized the firm's commitment to make "all reasonable provisions" for the safety and health of the Fremont plant employees. Respondent and Complainant Union agreed, further, to maintain a joint labor-management health and safety committee, with certain responsibilities and powers of recommendation, which were generally described. *Inter alia*, Respondent and Complainant Union declared that their committee "shall be concerned" with the nature of substances used within Respondent's Fremont plant, and safe exposure limitations.

d. *Contractual consensus*

With their contractual health and safety consensus reached, the negotiators "moved on" with their consideration turned to economic differences. On July 1, 1976,

Respondent and Complainant Union completed their negotiations. Their representatives signed a contract document which provided for a 3-year term, from July 4, 1976, through July 3, 1979, specifically. The contract's preamble designated the parties privy thereto. They were "Borden Chemical, Division of Borden, Inc." with a Fremont, California, location, together with "International Chemical Workers Union and its Local 733" collectively. Though International Representative Levine, personally, never became a contract signatory, Complainant Union's five committee members finally signed—so their contract document shows—for *both* Local No. 733 and that labor organization's parent body.

3. Complainant Union's Renewed Demands

a. *The Health and Safety Committee*

Since July 1976, contractually mandated health and safety committee meetings have been conducted monthly. Most recently, Respondent's production and engineering superintendent, Frank Tejera, has functioned as committee chairman. The committee members present, routinely, consider various matters related to plant health and safety, within a predetermined agenda. Minutes are kept. Subsequently, these minutes are published, distributed to committee members, and posted on Respondent's plant bulletin boards; copies are transmitted, likewise, to Respondent's Columbus, Ohio, headquarters.

Works Manager Sandberg, though nominally a committee member, does not—so his testimony shows—attend regularly. His testimony, nevertheless, warrants determinations that committee members have, historically, concerned themselves with "very particular" health and safety problems, rather than matters of general concern; that consensual committee determinations, calculated to resolve minor, safety-related, problems or complaints, may be "effectuated" directly, though Respondent's concerned production or maintenance personnel, consistently with directives communicated through the committee's chairman; and that committee recommendations calculated to resolve more serious complaints or problems—when formulated following some committee discussion and consensus—have been proffered for consideration by Works Manager Sandberg, or his corporate superiors.

b. *Complainant Union's list requests*

While a witness, Complainant Union's president testified that—during May 1976 and, likewise, throughout the 8-month period which directly followed Complainant Union's contract negotiations—several verbal requests for a complete "materials and chemicals" list had been communicated to Works Manager Sandberg, during various grievance meetings and general conversations. Respondent's works manager, so Ford claimed, had never rejected such requests, definitively. The Local president's testimony, in this connection, stands—however—without corroboration; Sandberg, while a witness, contradicted Ford's testimonial report. Upon this record, however, their witness chair disagreement—within my view—need not be resolved. Complainant Union's subsequently reiterated written and verbal demands for a comprehensive "materials and chemicals" list have been, herein, clearly confirmed.

On March 18, 1977, L. H. Gauthier II, Complainant Union's vice president and chief safety man, sent Works Manager Sandberg a handwritten letter wherein, he requested a complete list of "raw materials" used within Respondent's Fremont plant. Sandberg was reminded that such a list had been requested "back at contract time" previously; concurrently, he was notified that Complainant Union's request was being renewed.

On April 13, Respondent's works manager replied. Gauthier was reminded that—during a Monday, April 4, conference with International Representative Levine present—statements had been made that Respondent was currently "working" with Environmental Protection Agency personnel (EPA) to supply them with data regarding "all materials used" within Respondent's various facilities. Sandberg declared, further, that "while this work is going on, I am not in a position to separately give out this information." Respondent's works manager did suggest, however, that—should "the" industrial hygienist (note: presumably a hygienist, on union retainer, mentioned during their prior April 4 conference) require specific information—he could "probably" direct his questions, best, to Borden Incorporated's director of industrial health, Toshio Mekaru, specifically. Copies of Sandberg's letter were, so the record shows, dispatched to International Representative Levine, plus both McInerney and Mekaru, Borden, Inc. department heads.

While a witness, Sandberg conceded that his April 13 memorandum reference to a program, then current, pursuant to which the Environmental Protection Agency would be supplied with a list compassing "all materials used" within Respondent's various locations, though proffered consistenly with a good-faith belief regarding its correctness, had been bottomed upon some misconceptions. Respondent's corporate headquarters had, then, been compiling a complete "finished products" list, rather than a raw materials list. Respondent's works manager reported his current witness chair "belief" that EPA would, however, be provided with a complete "raw materials" list, within seven months following the conclusion of the May 1978 hearing, herein.

Within a week thereafter, during a personal conversation with Ford and Gauthier, Respondent's works manager was—again—requested to provide a complete raw materials list. While a witness, Sandberg declared that he could not recall replying that Complainant Union's requested list was still being complied; he conceded, however, that he would "probably" have characterized Complainant Union's request as beyond his jurisdiction, since it concerned a matter which Respondent's corporated headquarters would have to resolve.

For the record, Complainant Union's president purportedly recalled several further occasions—between April 13 and November 1977, particularly—when he, or International Representative Levine, had verbally solicited Respondent's compliance with Gauthier's prior written "raw materials" list request. References to Complainant Union's request, Ford testified, had been proffered during telephone conversations, during grievance meet-

ings, and during some less structured conferences. Complainant Union's president contended that his organization's request had been discussed monthly during this period; he could not, however, recall relevant dates. Ford recalled no flat refusal, chargeable to Respondent's work manager, with respect to Complainant Union's request. He testified, rather, that Sandberg had either mentioned a list which was being compiled or characterized Complainant Union's request as something no longer "in [his] hands" for disposition.

Respondent's works manager, though queried repeatedly in this connection, recalled no further conferences or telephone calls whatsoever—within the 7-month period with which we are now concerned—during which Ford or Levine had referred to Complainant Union's prior list request. Within their record context, Sandberg's positive denials, within my view, merit credence.

On November 1, 1977, Respondent's contractually designated health and safety committee met. *Inter alia*, Complainant Union's safety committee members presented a report. With respect thereto, the health and safety committee's minutes contain the following notation:

> The Union requested a copy of the raw material list on March 18, 1977. They have not received this list. Frank [Tejera, committee chairman] said this would have to be requested from Mr. Sandberg.

With this repetition of Complainant Union's request reported, Borden, Incorporated's Director of Labor Relations and Interntional Representative Levine communicated by telephone. The record, herein, warrants determinations—bottomed upon some stipulations by counsel with respect to what International Representative Levine would report, should he be summoned to testify—that he (Levine) concurrently placed a November 1, 1977, telephone call to McInerney, during which he requested a list of "raw materials and chemicals" handled within Respondent's Fremont, California, plant. While a witness, the labor relations director declared that he had, promptly, queried Levine with respect to whether some particular safety-health situation had developed within Respondent's Fremont facility. Levine, however, declared—so McInerney recalled—that nothing "specific" had developed. The director's testimony, descriptive of his reaction, reads as follows:

> I said, well, Jerry, the answer is still no. I'm surprised you are asking at this point in time. We had resolved this in negotiations, I went into the rationale again that permeated the whole negotiation, the confidentiality of the thing, the proprietary aspects, and I told him, I said, I will give you the benefit of the doubt. The answer is no—I will check it out for you, I'll give it another shot and see whether or not there has been any change. He said, fine, call me back.

On November 10, Borden, Incorporated's director of labor relations returned Levine's call. He reiterated Respondent's position, proclaimed management's willingness to discuss "particular instances" which might raise safety or health problems, but rejected Complainant Union's renewed "raw materials and chemicals" list request because compliance therewith would compromise certain confidential, proprietary, trade secret information. According to McInerney, Levine was queried, again, with respect to why Complainant Union's request was being renewed; the International representative replied, so McInerney testified, that he would "pass [the list] over" to Complainant Union's parent body, since he was "simply acting as a conduit" for requested data.

In this connection, Borden, Incorporated's director of industrial relations was questioned, further, regarding a particular segment of this conversation with Complainant Union's spokesman. He testified as follows:

> Q. (By Judge Miller) When you were describing your November telephone call from Mr. Levine . . . you [testified you] made a comment to Mr. Levine in that telephone conversation that you thought all questions related to the list—or rather all questions relating to health and safety, had been resolved in the contract negotiations of 1976? . . . Did Mr. Levine react to that statement, or did he just let it lie there?
>
> A. He just let it lie there.

With matters in this posture, communications between the parties, with particular reference to Complainant Union's list request, were suspended. On November 22, 1977, International Representative Levine filed the present charges.

C. *Discussion and Conclusion*

Within his Complainant, the General Counsel describes the workers' unit which he would have this Board consider appropriate for collective-bargaining purposes: His description compasses workers in Respondent's employ, within certain designated job classifications, within its Fremont, California, facility. Further, the General Counsel claims that—since July 4, 1976, and continuing to date—Complainant Union has represented a majority of Respondent's employees within the bargaining unit described; that, by virtue of Section 9(a) of the Act, Complainant Union has been, and remains, the exclusive representative of Respondent's employees within that bargaining unit; and that, since the date designated, Respondent and Complainant Union have been privy to a collective-bargaining contract covering Respondent's employees therein.

Respondent's formal answer, however, reflects concessions, merely, that workers within the job classifications described, employed by Adhesives & Chemicals—West, Division of Borden Chemical, a Division of Borden, Inc., constitute a unit appropriate for collective-bargaining purposes; that Complainant Union has been, since July 4, 1976, the exclusive representative of those employees, within its Fremont, California, facility; and that, during the 6-month period directly preceding Complainant Union's filing of the charge which initiated this matter, Respondent and Complainant Union have been privy to a collective-bargaining contract covering employees of Adhesives & Chemicals—West, a Division of Borden

Chemical, solely. Questions necessarily raised, because of the differences noted between the General Counsel's complaint claims and Respondent's patently discrepant concessions, have not been litigated. Respondent's collective-bargaining contract with International Chemical Workers' Union and Local No. 733, Complainant Union herein, has—however—been proffered for the record. That contract, clearly, covers:

> All of the Company's production, warehouse, truckdrivers and maintenance employees, including working foremen who perform any production or maintenance work at the Company's said plant at 41100 Boyce Road [Fremont, California] . . . . save for certain excluded categories.]

Consistently therewith, I find that Respondent's Fremont, California, plant workers, within both AC West and Printing Ink Divisions, covered by Complainant Union's current contract, constitute a unit appropriate for collective-bargaining purposes; and that Complainant Union, pursuant to Section 9(a)'s mandate, functions as their exclusive representative.

1. Respondent's 10(b) contention

Within its formal answer, Respondent alleges that Complainant Union's several requests for information, described within the General Counsel's complaint, were made more than 6 months before a charge, purportedly bottomed thereon, was filed; Respondent contends, therefore, that the General Counsel's complaint, consistently with Section 10(b) of the statute, should be considered time-barred. Within his brief, however, Respondent's counsel currently discusses no such contention.

With matters in their present posture, the contention must be rejected. True, Respondent's consistent failures of compliance, with respect to Complainant Union's April 1, 1976, and March 18, 1977, requests for a complete "raw materials and chemicals" list, were manifested more than 6 months before International Representative Levine filed his November 22, 1977, charge. The General Counsel's representative, however, makes no contention, herein, that Respondent's postponement or refusal of compliance, with respect to these early requests, flouted a statutory mandate. Complainant Union's spokesman, Levine, clearly repeated Complainant Union's request, during his November 1, 1977, telephone conversation with Borden, Incorporated's director of labor relations. And McInerney's subsequent November 10 categorical refusal to provide the requested list stands conceded. With respect to Respondent's final rejection of Levine's request, the General Counsel's complaint must, clearly, be considered timely. Compare *J. Ray McDermott & Co., Inc.* v. *N.L.R.B.*, 571 F.2d 850, 858 (1978), enfg. 227 NLRB 1347, 1348 (1977), in this connection.

Respondent's defensive presentation, however, suggests a further, related contention, which—within my view—merits notice. Substantially, Respondent's counsel has suggested that—since International Representative Levine patently speaks for Complainant Union's parent organizations; since neither he nor any specifically designated International Chemical Workers Union representative had, prior to November 1977, signed Respondent's currently effective collective-bargaining contract, on behalf of Complainant Union's parent body, and since his November 1, 1977, communication with Borden, Incorporated's director of labor relations merely compassed a request for a complete "raw materials and chemicals" list which he proposed a transmit to Complainant Union's parent, specifically—no request, presented on behalf of some proper collective-bargaining representative speaking for Respondent's Fremont workers, can be found herein.

Within my view, that suggestion—though hardly deserving of censure as friovolous—surely merits characterization as captious, for several reasons. *First*, when Respondent's representatives negotiated their current contract with Complainant Union, they clearly recognized and dealt with Levine as Complainant Union's qualified spokesman. *Second*, Respondent's current contract—though it may not carry Levine's signature—nevertheless plainly designates *both* the International Chemical Workers Union *and* Complainant Union as *collectively* privy thereto; nothing within the present record, within my view, would warrant a determination, herein, that their conjoint designation should be considered nugatory. Compare *The Ingalls Shipbuilding Corporation*, 143 NLRB 712, 743 (1963), in this connection. *Third*, Levine's November 1, 1977, telephone "list" request, clearly, paralleled the request which Complainant Union's safety committeemen had, that very day, reported and reiterated within Respondent's plant Health and Safety committee; though he may have suggested, *en passant*, that Respondent's list, when provided, would be transmitted to some International designee, Levine's request was clearly being presented in Complainant Union's behalf. Upon this record, Respondent's presumptive suggestion that Complainant Union's conceded local representatives, *pro sese*, presented no November 1977 list request, or that International Representative Levine, somehow, lacked "standing" to present such a request, when he communicated—finally—with Borden, Incorporated's director of labor relations, carries no persuasion.

2. The obligation to furnish information

The statutory duty of employers to provide relevant information, requested by the collective-bargaining representatives of their employees, has long been recognized. See *S. L. Allen & Company, Inc.*, 1 NLRB 714 (1935). Therein, this Board noted that interchanged concepts—coupled with the communication of facts peculiarly within the knowledge of either party—constitutes the essence of the bargaining process.

Thus, the general obligation of concerned employers to provide requested information, which a collective-bargaining representative may require for the proper performance of its duties, can no longer be questioned, *N.L.R.B.* v. *Acme Industrial Co.*, 385 U.S. 432, 435–436 (1967); *N.L.R.B.* v. *Truitt Manufacturing Co.*, 351 U.S. 149 (1956). A labor organization which represents employees, within a defined bargaining unit, with respect to their employment terms and conditions, is clearly entitled, upon some appropriate request—by operation of the

statute—to such information, whether it seeks requested data for purposes related to contract negotiations, or purposes related to diurnal consultations, during a contract's terms. The sole criterion for determining whether requested information must be produced is its relevance or reasonable necessity for the labor organization's proper performance of its representative role. *The Detroit Edison Company*, 218 NLRB 1024, 1033 (1975), reversed and remanded on other grounds 440 U.S. 301 (1979), and cases therein cited. In this connection, the labor organization need merely demonstrate "the probability that the desired information [is] relevant, and that it [will] be of use" when that organization fulfills its statutory duties and responsibilities. *N.L.R.B.* v. *Rockwell-Standard Corporation, Transmission and Axle Division, Forge Division*, 410 F.2d 953, 957 (6th Cir. 1969), quoting from *N.L.R.B.* v. *Acme Industrial Co., supra* at 437, fn. 6. This standard of relevancy, clearly, comports with discovery-type standards, rather than trial-type standards; labor organizations must be permitted access to a broad range of potentially useful information, likely to facilitate intelligent collective bargaining. This broadly permissive standard governs, this Board has noted, since "all possible ways" in which requested information "may become important" cannot be foreseen. *Northwest Publications, Inc.*, 211 NLRB 464, 466 (1974). A particular labor organization's burden of proof, when "relevance or reasonable necessity" must be determined, may vary; nevertheless, the ultimate standard of relevancy remains applicable, the nature of the material sought.

3. Relevance of the information sought

This Board has consistently held, with judicial concurrence, that wage and related information, pertaining directly to workers within a bargaining unit, will be considered *presumptively* relevant. *Curtiss-Wright Corporation, Wright Aeronautical Division* v. *N.L.R.B.*, 347 F.2d 61, 68, 69 (3d Cir. 1965); *Cowles Communications, Inc.*, 172 NLRB 1909 (1968). Since such data, necessarily, concerns the core of the employer-employee relationship, the union need not demonstrate its precise relevance, save in cases wherein some effective employer rebuttal has been proffered. The reasonable necessity for a labor organization to have relevant data has been considered patent; separately considered, necessity constitutes no unique guideline, but bears a direct relationship to the requested data's relevance.

Conversely, when a labor organization requests information which cannot be considered "ordinarily" relevant to its performance as bargaining representative, but which is alleged to have become so because of peculiar circumstances, some special showing of pertinence has "quite properly" been required, before concerned employers have been obliged to proffer requested disclosures. See *Prudential Insurance Company* v. *N.L.R.B.*, 412 F.2d 77, 84 (2d Cir. 1969), and cases therein cited, in this connection.

Plant safety rules and safe work practices, however, clearly constitute "conditions of employment" with respect to which collective bargaining—pursuant to statutory requirements—has consistently been considered mandatory. *N.L.R.B.* v. *Gulf Power Company*, 384 F.2d 822, 824–825 (5th Cir. 1967), citing *Fibreboard Paper Products Corp.* v. *N.L.R.B*, 379 U.S. 203, 222 (1964) (Justice Stewart, concurring). Requests for information related to workplace health and safety problems, therefore, may properly be considered—like "wage" data—*presumptively* relevant to any collective-bargaining representative's proper performance of its statutory functions. Terms and conditions of employment, like wages, concern the core of the employer-employee relationship. A collective-bargaining representative's need for information, therefore, may—quite properly—compass data bearing upon nonwage terms and conditions. And requests for data concerning such matters will, therefore, carry presumptive relevance, regardless of their "immediate" connection with the negotiation of diurnal administration of collective-bargaining contracts. See *The A. S. Abell Company*, 230 NLRB 17 (1977); *Western Massachusetts Electric Company*, 234 NLRB 118 (1978), in this connection.

Since, concededly, Respondent's Fremont plant, with which we are concerned, produces chemical products, some of which may require the handling and processing of raw materials and chemicals possessing hazard potentials, there can be no doubt—upon this record—that considerations of health, safety, and physical well being carry some critrical significance of that plant's employees. Within his March 18, 1977, letter, indeed, Complainant Union's vice president spoke of their "growing concern" regarding "exactly what they [were] working with" within Respondent's plant site. Complainant Union was, therefore, clearly requesting—herein—relevant "potentially useful" data with regard to plant working conditions:

No contention has been proffered, herein, that Complainant Union's request was overbroad. Respondent's grounds for refusal—which will be discussed, further, within this Decision—did not derive from a conviction that Complainant Union was requesting "considerably *more* information" that some disinterested expert might consider required, or directly related to that organization's collective-bargaining purposes. Compare *The Kroger Co.* v. *N.L.R.B.*, 399 F.2d 455, 457–459 (6th Cir. 1968), denying enforcement of 163 NLRB 441 (1967). Rather, Respondent maintained, and continues to maintain, that Complainant Union's requested data would not be "useful" for collective-bargaining or contract policing purposes, since such data, *standing alone*, would not enable Complainant Union's representatives to focus on matters of concededly prime organization concern—the *adequacy of* Respondent's currently maintained "health and safety" protective measures. That contention will be considered, subsequently, herein.

And Respondent's management representatives had, so the record shows, previously been made aware with regard to Complainant Union's reasons for requesting a complete "raw materials and chemicals" list. Union spokesmen had—before March 18, 1977, specifically—manifested their general concern with regard to plant health and safety, both during their prior 1976 contract negotiations, and thereafter. While a witness, herein, Complainant Union's president testified:

> I believe it really got going in negotiations to let them know at the time Borden's didn't have a high genuis [Note: hygienist?], so they were relying on the manufacturer's word that a lot of chemicals were safe to work with and, as you know, a lot of manfacturers, a lot of them have gone out of business because of the pressing [Note: surprising?] evidence on some of the chemicals and some of these chemicals, we don't know what we're working with either . . . . Well, it relates back to prior conventions that the International puts on, health and safety conventions, and they have had doctors, hygienists, industrial hygienists, speak at these conventions, and they have brought out the fact that there are some chemicals that are carcinogens, which are cancer causing at certain levels or temperature, and unsafe exposure to these chemicals, and it was on the basis of the knowledge of these doctors that we turned to the International, the industrial hygienist, and we also work with a doctor out in Berkeley, Dr. James Dolgren . . . . I'm pretty sure, yes, that Jerry Levine let them know right off the bat where we were coming from as far as what the purpose of getting the raw material and chemical list for . . . . Jerry Levine went into it in detail more than once when I was present with the Company, the reason whey we wanted the list.

Further, Works Manager Sandberg's April 13, 1977, reply to Complainant Union's prior written request suggests, rather clearly, that "safe environment" conditions within Respondent's Fremont plant, the possible presence of "known carcinogens" therein, and Complainant Union's planned consultations with some "outside" hygienist, had been discussed, during a plant conference shortly prior thereto.

With matters in this posture, determination certainly seems warranted, within my view, that the specific data which Complainant Union sought—regarding the trade names, code names, and generic chemical names of those materials and chemicals which Fremont plant workers handled—was *presumptively* relevant. Respondent contends, however, that such a bare, straightforward list—should it be supplied pursuant to Complainant Union's request—would prove neither directly relevant nor helpful. Thus, Respondent's testimonial proffers, calculated particularly to *rebut* The General Counsel's presentation regarding the requested list's *presumptive* relevance, must not be considered.

In this connection, Director of Industrial Health Mekaru testified that, should the requested list be provided, Complainant Union's qualified consultants could merely determine the toxic properties of whatever raw materials and chemicals Respondent's management had listed; that Fremont plant workers have no "need to know" those toxic properties, which might pertain to multifarious chemicals and materials handled or processed within their workplace, since such data—*per se* — would not facilitate Complainant Union's criticism or evaluation of Respondent's protective measures, and thus would communicate nothing of substance directly calculated to preserve their health or promote safety; that Respondent's professionally qualified personnel, charged with responsibility in this connection, have—already—determined the toxic properties of various substances handled and processed within the Fremont plant; that control devices, protective clothing, safe procedural techniques, and practical rules of hygiene, calculated to provide maximum health and safety protection, have been developed, promulgated, and publicized by Respondent's management; that the familiarity of Respondent's workers with various control devices, their proper utilization of protective clothing, and their compliance with required procedures and practices have prevented their exposure to potential hazards, or have limited their exposure to governmentally prescribed or previously determined safe levels; and that—consequently—the knowledge shared by Respondent's workers, *though confined to these matters solely*, should be considered both relevant and sufficient whenever specific "health and safety" problems within their workplace are being considered. Further, within his brief, Respondent's counsel suggests that—since Respondent's and Complainant Union's contract negotiators have, heretofore, conducted their "numerous, wide-ranging and productive" negotiations, concerning health and safety questions, without a complete "raw materials and chemicals" list provided for Complainant Union's perusal—their realized contractual consensus, with respect to such questions, demonstrates empirically that Complainant Union's previously requested list had neither been, nor would be, relevant or reasonably necessary with respect to maximizing Complainant Union's collective-bargaining capacity. Respondent's defensive presentation, also, suggests a third contention—that its currently maintained prophylactic measures meet specific requirements which the Federal Government's OSHA, together with other concerned governmental agencies, have defined.

Upon the record, however, Respondent's contentions carry no persuasive thrust. This Board should reject them, within my view, for several reasons.

While a witness, Director of Industrial Health Mekaru reported, substantially, that Respondent's currently developed programs, practices, and procedures, calculated to preserve health and promote workplace safety, derive from two principal considerations. *First*, Respondent has developed control devices, plant procedural techniques, and required hygiene practices, calculated to preclude or minimize certain *previously known* or *recently discovered* risks, with respect to which compliance with governmentally determined protective requirements may have been mandated. *Second*, the firm's concerned hygienists have, themselves, formulated prophylactic programs reasonably calculated to provide Respondent's workers with "sufficient" protection, relative to *particularized* hazards, based on their determinations that such hazards are demonstrably presented by specific materials or chemicals handled and processed within Respondent's plants. With respect to such situations, however, Respondent's currently mandated protective measures—concededly—reflect corporate reactions to specific problems, rather than programs calculated to promote broadly preventive poli-

cies. When questioned by the General Counsel's representative, Mekaru testified:

> Q. (By Mr. Altemus) . . . [If] you had a plant, a chemical plant . . . and I was bargaining with you over the safety procedures in the plant and the working conditions in the plant . . . wouldn't then a list be relevant to intelligently discuss those procedures and those conditions?
>
> A. In my opinion, no. *What would be relevant is whether or not we are seeing real problems with respect to the workers themselves.* Without that, the presumption is the procedures are adequate, because we are not dealing with potentials . . . [*Absent*] *man problems, procedures are presumed to be adequate.* . . .
>
> Q. Let me make myself more clear, Mr. Mekaru, assuming I questioned your procedures, in order to intelligently discuss alternative procedures, I would need to know the chemicals that the employees are dealing with, would I not? . . .
>
> A. Alternative, now I have to answer that from an industrial hygiene standpoint, *that you really don't need an alternative procedure if the procedure is working.* [Emphasis supplied.]

Borden, Incorporated's director of industrial health, further, commented—though with some circumspection—that, while Respondent's protective measures, when promulgated, must provide "adequate" protection, such protection must be provided with due regard for management's need to preserve productive efficiently. In this connection, the hygienist testified:

> Q. (By Mr. Altemus) But, isn't it a fact, Mr. Mekaru, that two procedures could be both acceptable but different, nonetheless? Correct?
>
> A. Two procedures could be acceptable and different, yes.
>
> Q. So, there could be some discussion over difference of procedures? . . . [There] could be a valid difference of opinion, could there not, over which procedure to use?
>
> A. Yes. . . . When you said there would be a difference of opinion on procedures, the procedures that we implement, especially not only covers the appropriate protection of the workmen, but takes into consideration the management prerogative of doing the thing [in the] most expedient way. It is obvious that you can come up with a different opinion of doing it a circumventional way, taking more time, super-precautious . . . and that would not be incorrect. [It] is an alternate procedure which is just the same, but it does not take into account the necessity to get a job done within the time frame the work force is kept within the workplace. . . . I would agree with you, you can come up with alternate procedures, [which in] the opinion of the person making the recommendation would be considered better or equivalent, but the person that is making that recommendation, that is not part of the management, does not take into account the necessity of having the job done in a most expedient way.
>
> * * * * *
>
> JUDGE MILLER: . . . I take it what Mr. Mekaru is saying is that when management makes a decision as to what procedure is appropriate, one of the factors that management takes into account is how to get the job done most efficiently . . . that in the process of negotiation, between a Union, for example, and management, when management says we consider this particular procedure appropriate and sufficient, and at the same time it helps us get the job done, that it is possible for the person on the opposite side of the table, the Union negotiator in this instance, to say, yes, it may be appropriate and efficient and get the job done, but in our opinion a better procedure would provide better protection for the worker and we want you to stand the extra cost. That is a possible line of argument across a bargaining table, is it not?
>
> THE WITNESS: Yes, but with one condition, that they can demonstrate that our procedure is causing a problem. *Do you have a health problem associated with our procedures.* [*Are*] *we getting additional complaints, if you will.* [That] raises it [Note: the discussion?] to the point of whether or not the procedure is adequate. Absent that, we are talking about something that is good, adequate, but we change for change's sake. [Emphasis supplied. Interpolations provided to promote clarity.]

Considered in totality, Mekaru's description of Respondent's plant hygiene policies and practice—though proffered with candor, explicated with professional expertise, and defended with conviction—provides no persuasive rebuttal, within my view, sufficient to undercut the General Counsel's contention that a complete "Raw materials and chemicals" list, provided pursuant to Complainant Union's request, would have presumptive relevancy.

Respondent's current plant hygiene program may serve management's purpose well. More, particularly, Respondent's broad spectrum of control devices, protective clothing, technical procedural directives, and safe practice rules, calculated to preserve health and promote workplace safety, may indeed provide Fremont plant workers with "adequate" protection against known toxicological risks, while permitting management to maintain *optimum* production. However, shared knowledge, confined merely to familiarity with a plant management's currently maintained protective measures, provides neither Respondent's Fremont workers, nor their collective-bargaining representative, with sufficient data to facilitate continuous "intelligent" contract policing or prospective contract negotiations. Such narrowly focused knowledge, clearly, could never promote or facilitate discoveries with respect to whether specific "materials and chemicals" handled within Respondent's plant may present potential hazards not yet manifested within Respondent's work force, never previously recognized within a laboratory, and thus not yet cognizably forestalled.

While a witness, Mekaru conceded that certain chemicals carry known hazard potentials which may, or may not, produce significant harms, depending upon the *frequency* with which workers come in contact with them, the *quantities* which such workers may be required to handle the chemicals, the *duration* of their particular inhalation, physical ingestion, or skin contacts, worker histories of repeated, *long-term* contacts, and whether such contacts may be made within *confined* or relatively open locations. With respect to some of these determinative conditions, perhaps several of them, data sufficient to warrant some conclusions regarding degrees of potential risk may currently be unvailable; upon the present record, Respondent's management, within my view, cannot claim—persuasively—that a fully developed "state of the art," within the field of known chemical hazards, forecloses the possibility of further discoveries.

Respondent's determination to withhold a complete materials list, necessarily, precludes Complainant Union from seeking determinations—derived from "independent" consultation or research—regarding the toxic properties of chemicals handled and processed within the firm's Fremont plant. Conceivably, *some* potential hazards—clinically or experimentally traceable to significant or sustained "exposure" involving such chemicals, but never previously suspected, never previously recognized, never reported to Respondent's concerned professionals, and never previously verified—could, therefore, remain undetected, pending their definitive physiological manifestation within a significant number of Respondent's workers.

While a witness, Borden, Incorporated's director of industrial health conceded that Respondent's protective procedures—beyond those provided pursuant to governmental mandates—reflect corporate responses to recognized "man problems" solely, and that such problems have, conventionally, been recognized whenever "frequent" complaints, reporting "similar" symptoms, have been received from "all the other operations" where particular chemicals are handled. Neither Respondent's plant workers nor their collective-bargaining representative—within my view—should be required to wait, however, for some never previously recognized hazard's significant manifestation, within Respondent's work force, before suggesting, urging, or bargaining for new or improved protective measures. Pedestrians need not wait to be hit, before leaping for the curb. Compare *Westinghouse Electric Corporation*, 239 NLRB 106 (1978), citing *Robert J. Weber and Richard Weber d/b/a Weber Veneer & Plywood Company*, 161 NLRB 1054, 1056 (1966); therein, this Board reiterated its view that a labor organization's right to relevant information is not dependent upon the existence of some particular controversy, or the need to dispose of some recognized problem. The right validates requests for data reasonably necessary to enable organizations to administer contracts intelligently and effectively, or to seek their modification. And, Respondent's policy of nondisclosure with respect to chemicals handled within its plants—since it could, conceivably, preclude or discourage Complainant Union's determination to identify potential workplace hazards, previously unrecognized, and to bargain for protective measures calculated to promote their removal or reduction—clearly would deprive Complainant Union of relevant, reasonably necessary, data calculated to facilitate that organization's fulfillment of its statutorily recognized role.

Further, without a list, Complainant Union's representatives could neither question nor verify the correctness or sufficiency of Respondent's posted "hazard code" designations. Clearly, therefore, they could not police Respondent's compliance with its contractual commitment to make "all reasonable provisions" for worker safety and health within its Fremont plant. Respondent's claim, that its protective measures have been—empirically—proven sufficient to preserve workers' health and promote workplace safety, would have to be taken on faith. Management's good will and high-minded purpose, in this connection, have not, herein, been questioned; clearly, however, Complainant Union cannot be faulted for some unwillingness to rely on Respondent's conceded "good intentions" merely.

In this connection, further, I note—officially—that the Federal Occupational Safety and Health Administration recently published a proposed rule, in the Federal Register, with respect to "Access to Employee Exposure and Medical Records" which proposed rule is designed to provide employees, former employees, and their representatives, specifically including labor organizations, with health and safety related data. 43 F.R. 31371 (July 21, 1978). Therein, OSHA noted that:

> The goals of occupational safety and health are not adequately served if employers do not fully share the available information on toxic materials and harmful physical agents with employees. Until now, lack of this information has too often meant that occupational diseases and methods for reducing exposure have been ignored and employees have been unable to protect themselves or obtain adequate protection from their employers. By giving employees and their designated representatives the right to see relevant exposure and medical information, this proposal will make it easier for employees to identify worksite hazards, particularly workplace exposures which impair their health or functional capacity. Increased awareness of workplace hazards will also make it more likely that prescribed work and personal hygiene practices will be followed.

For these reasons, as well as those previously mentioned, I find the present record—despite Mekaru's comprehensive, professionally grounded, testimonial presentation—sufficient to demonstrate a reasonable "probability" that Complainant Union's requested materials list would prove relevant, and that such a list "would be of use" whenever Complainant Union might, hereafter, seek to discharge statutory duties and responsibilities.

4. Complainant Union's putative contract remedies

Respondent's defensive presentation suggests a contention that Complainant Union's pursuit of requested "materials and chemicals" data, through Board process, should be considered barred, since that organization's contractual remedies for Respondent's conceded refusal

to provide presumptively relevant disclosures have been pursued. More particularly, Respondent cites Complainant Union's purported failure to request a complete materials list through contractually provided health and safety committee procedures; further, within his brief, Respondent's counsel likewise notes Complainant Union's failure to file a contractual grievance regarding Respondent's conceded list refusal. Within my view, however, Respondent's presumptive contention, that Complainant Union's prior failure to pursue these contractual procedures should—now—bar the General Counsel's claims of statutory right, merits rejection.

With respect to Respondent's suggestion that Complainant Union's representatives should have sought whatever data they considered relevant and reasonably necessary through health and safety committee processes: The record reveals, clearly, that—while that committee functions pursuant to contractual directives which, *inter alia*, require its continued "concern" with the nature of substances used within Respondent's Fremont plant—no specific mandate to compile a complete "materials and chemicals" list can be found therein. Clearly, such a list's preparation could hardly be considered within the committee's contractually defined jurisdiction.

Thus, when Complainant Union's safety committeemen, during the committee's November 1, 1977, meeting, reported that their previous request for a raw materials list had not yet been honored, the committee chairman declared, merely, that such a list would have to be requested from Respondent's works manager.

Further, the record, herein, warrants a determination, which I have made, that—with respect to major matters, presumptively of plantwide concern—the committee may proffer consensually grounded recommendations, merely. Clearly, Complainant Union's list request—forwarded with committee sanction—would have carried no greater force than requests directly transmitted to Work Manager Sandberg or Borden, Incorporated's director of labor relations. Union representatives cannot be faulted for their longtime failure to follow a futile course.

With respect to Complainant Union's conceded failure to pursue contractual grievance and arbitration procedures: President Ford testified, substantailly, that no grievance was filed, bottomed upon Respondent's failure or refusal to provide a materials list, since "the language [upon which Complainant Union would have to rest its claim] was not in the contract" when Respondent's management representatives, finally, confirmed their reluctance to satisfy that labor organization's reiterated request; Ford's proffered rationale for Complainant Union's failure to proceed, clearly, disposes of Respondent's contention. See *Curtiss Wright Corporation; supra* at 71. Within its decision, noted, the Third Circuit's panel declared:

> We also cannot accept the Employer's argument that the proper forum for the resolution of the issue of whether the requested data is relevant is through the grievance machinery. When read together, *Sinclair Refining Co.* v. *N.L.R.B.* [306 F.2d 569 (5th Cir. 1962)], and *Timken Roller Bearing Co.* v. *N.L.R.B.* [325 F.2d 746 (6th Cir. 1963)] demonstrate that only when the demand for information itself is contractually subject to the grievance procedure, as the method of union data accumulation, will that procedure be exclusive . . . . Demands for information are usually precursors to the submission of complaints and grievances to grievance and arbitration machinery . . . . Thus, unless the collective-bargaining agreement both contains a broad disclosure provision and the grievance and arbitration provisions are also couched most broadly, clearly, indicating that demands for information are to be made through the grievance and arbitration machinery, the existence of such machinery is no defense to an employer who has refused to supply relevant data upon a union request.

Complainant Union's current contract, however, provides—merely—that complaints concerned with working conditions, together with disputes concerned with contract interpretations, should be processed through grievance procedures. Vice President Wood's first request for a complete "raw materials and chemcials" list had been proffered, specifically, to facilitate prospective "intelligent" bargaining; Respondent's contractual committment with respect to compliance had not been sought. And, when reiterated during November 1977, specifically, Complainant Union's request, clearly, derived from prior claims of statutory, rather than contractual, right. Accordingly, Respondent's defensive plea, presumptively grounded in some contrary view, merits rejection. Compare *Hekman Furniture Company*, 101 NLRB 631, 632 (1952), in this connection. Presumably, Respondent's contention would be considered without merit, even if the parties had committee themselves to consider matters not covered by their contract, and never canvassed in collective bargaining, grievable.

5. Complainant Union's possible alternative sources

Within his brief, Respondent's counsel suggests, further, that—should this Board find Complainant Union's requested data relevant and reasonably necessary to its discharge of bargaining representative functions—determinations would, nevertheless, be warranted, that such data have, throughout, been "readily accessible" both to plant workers and union representatives. Counsel contends, therefore, that his client should not be faulted, merely, because the firm's management representatives have, thus far, failed to refused to provide "raw material and chemical" designations in some requested list form. *N.L.R.B.* v. *Milgo Industrial, Inc.*, 567 F.2d 540, 543–544, fn. 2 (2d Cir. 1977); *McCulloch Corporation*, 132 NLRB 201, 209 (1961); *California Portland Cement Company*, 101 NLRB 1436, 1441 (1952). In this connection, Respondent's counsel summarizes the basic principle which this Board should—within his view—consider determination herein; he suggests that this Board should consider "all the facts and circumstances of the case" when determining whether the recipient of some request for relevant information must compile and present such data precisely in the form requested. Thus—counsel contends—whenever the record clearly warrants a determi-

nation that requested data has "already" been made "available" in some format which could satisfy a complaining labor organization's need, the concerned employer need take no initiative to compile such information conformably with that organization's request.

Respondent suggests that such a situation has been sufficiently demonstrated within the present record; the firm, consistently with this contention, seeks a determination that its conceded refusal to supply Complainant Union's requested "list" flouted no statutory duty.

Respondent cites the record, which reveals—without dispute—that code numbers or descriptive designations—for various raw materials and chemicals handled and processed within the Fremont plant—can be found on AC West's manufacturing order forms, and Printing Ink Division batch tickets, which are routinely posted within certain readily accessible plant locations. Thus, to determine "each and every material or chemical" stored and handled within the Fremont plant, Complainant Union's officers currently in Respondent's hire, or concerned workers, would simply have to note the code numbers of descriptive designations of formula materials listed on such posted manufacturing orders or batch tickets, then visit the plant location where such materials are stored, and there locate the material. They could, then, note the name of the material's supplier, its generic or trade designation, and prescribed "safe handling" procedures. Moreover, with respect to substances designated solely by their trade names, Respondent claims that Complainant Union's searchers could request OSHA Form 20s from the Fremont plant's suppliers; Respondent claims that such forms, when provided, would fully satisfy Complainant Union's data needs, relative to potential plant health and safety hazards.

Respondent's witnesses, Director of Industrial Health Mekaru and Associate Director of Quality Assurance Drugge, testified, in this connection, that chemical producers must provide OSHA Form 20s to commercial users or manufacturers who purchase their chemicals, whether for direct use or further processing. The forms, when supplied, reveal: The chemical family, specific chemical name, trade name, and formula of the material described; the various hazardous ingredients which it may contain; some physical data; fire and explosion hazard information; health hazard data; specific information regarding the material's characteristics; recommended spill or leak procedures; and special protection information; together will special precautions required in connection with the material's handling and storage.

While a witness, Respondent's associate director of quality assurance declared his belief—but nothing more—that chemical manufacturers who provide Respondent's raw material components would, most likely, provide OSHA Form 20s when requested by union representatives or concerned Fremont workers; Drugge could not, however, so testify positively.

Upon this record, Respondent's contention—that it should not be required to provide Complainant Union's requested materials list, since Complianant Union could, independently procure such data—merits rejection, for several reasons.

First, Respondent's proposal, regarding the procedure which Complainant Union's representatives or particular members might follow when gathering desired data—would, clearly, require such information seekers to undertake significally burdensome tasks. Respondent's witnesses have conceded that Complainant Union's compilation of some substantially complete "raw materials and chemicals" list—derived from data compiled pursuant to the procedure hereinabove suggested—would require weeks, perhaps months. Fremont's management, however, could have such a list compiled with comparative speed.

While a witness, Plant Manager Palmer of Fremont's Printing Ink Division, testified that a complete list of his division's raw materials and partially processed "intermediate" chemical compounds—compassing some 700 different products—could be complied from the division's inventory records, coupled with some physical vertification, within 2 days.

Further, the record suggests that plant production workers who compile "raw material and chemical" lists, derived from manufacturing orders and batch tickets, while supplementing such lists with data which they may find on stored material containers, may—conceivably—be considered in violation of Respondent's posted shop rules, or their previously signed "trade secret" compacts, which will be discussed, subsequently, within this Decision.

Second, I note, officially, that OSHA Forms 20, though *required* under U.S. Department of Labor safety and health regulations from employers engaged in ship repairing, ship building, and ship breaking, are *not similarly required* from manufacturers in other industries; they may be voluntarily provided, and presumably are provided, frequently, by chemical manufacturers, but their preparation and distribution cannot be compelled. See 29 C.F.R., Section 1915.57(a), (b), (c), (d), and (e), 1916, 1917. Further, the likelihood that chemical producers would, upon request, provide them to labor organizations or particularly concerned workers—who may not represent commercial purchasers—can hardly be considered persuasively demonstrated, within the present record.

Third, this Board has, heretofore, held that—absent special circumstances—a labor organization's right to information will not be considered "defeated" merely because that organization could acquire reasonably needed information through some independent course of investigations *The Kroger Company, supra* at 512-513; see footnote 9 cases, therein cited. Labor organizations cannot be considered obligated to pursue burdensome procedures, for the purpose of obtaining desired information available in some more convenient form. Compare *Borden, Inc., Borden Chemical Division*, 235 NLRB 982 (1978). This Board considers collective-bargaining representatives entitled to whatever "accurate and authoritative statement of facts" concerned employers can provide.

6. Complainant Union's purported waiver

With matters in this posture, Respondent contends, nevertheless, that Complainant Union's representatives—

through a sustained course of conduct maintained during contract negotiations and thereafter—waived their organization's putative right to request, or receive, Respondent's complete "raw materials and chemicals" list.

This Board's decisions, however, reflect certain principles, considered well settled, which—within my view—should be dispositive with respect to Respondent's suggestion. Before a labor organization's waiver of statutory rights can be found, some record showing must be made, with respect to such a waiver's manifestation in clear and unmistakable terms. See *Tide Water Associated Oil Company*, 85 NLRB 1096, 1098 (1949), wherein this Board first declared its reluctance to deprive employees of statutorily guaranteed rights, absent some "unclear and unmistakable showing" that such rights had been waived. This "clear and unmistakable" standard was, shortly thereafter, specifically applied to conceivable waivers of the right to information. *Hekman Furniture Co, supra* at 632. Since that decision, this Board has consistently applied its declared standard, when confronted with purported waivers of some right to receive information, statutorily grounded. See *Globe-Union Inc.*, 233 NLRB 1458 (1977), in this connection.

The Board has, however, recognized that "clear and unmistakable" waivers may be manifested either within a collective-bargaining contract's specific terms or by statements and conduct during collective-bargaining negotiations. *The Timken Roller Bearing Company* v. *N.L.R.B.*, 325 F.2d 746, 751 (6th Cir. 1963), enfg. 138 NLRB 15 (1962); *Univis, Inc.*, 169 NLRB 37, 39 (1968); *Globe-Union, Inc., supra.* Herein, neither their contract's specific health and safety provision, nor any other provision negotiated by the parties, reflects Complainant Union's withdrawal of its statutory right to request, or receive, Respondent's complete materials list. Compare *Gary-Hobart Water Corporation*, 210 NLRB 742, 744–745 (1974). Clearly, therefore, no waiver can be found within their contract's terms.

Conceivably, both the General Counsel and Complainant Union could maintain—contrariwise—that the health and safety provision which Complainant Union and Respondent negotiated implicity compasses Complainant Union's right to receive a materials list. That contractual provision requires labor-management health and safety committee members to concern themselves, *inter alia*, with the "natures of substances" handled and processed within Respondent's plant. Since Complainant Union's representatives function as committee members, some colorable argument could be proffered, certainly, that such contractual language concedes their right to the materials list. However, should the contractual "natures of substances" reference be construed to call for something less than a *complete* list of materials and chemicals handled within Respondent's Fremont plant, this Board's settled decisional doctrine—that a labor organization's right to information derives from the statute rather than contract—would still be determinative.

Respondent's counsel, however, contends that Complainant Union's waiver manifestations were vouchsafed during their contract negotiations. Clearly, bargaining histories can support waiver claims. Compare *International News Service Division of The Hearst Corporation*, 113 NLRB 1067, 1071–72 (1955). This Board's decisions, rendered with judicial concurrence, further make it clear, however, that waivers of statutory right, purportedly manifested at some bargaining table, will not be lightly inferred. *Timken Roller Bearing Co., supra.* In this connection, the Board has, consistently, held that—when subjects have been discussed during precontract negotiations—the mere fact, standing alone, that the contracting parties may not, finally, have covered the matter, specifically, within their resultant document, will not be considered a clear waiver manifestation. *Perkins Machine Company*, 141 NLRB 98, 102 (1963). Accord: *Magna Copper Company, San Manuel Division*, 208 NLRB 329 (1974); *Globe-Union, Inc., supra.* This Board, within its *Perkins* decision, declared:

> [a] purported waiver will not be lightly inferred in the absence of "clear and unequivocal" language. Even when the parties consciously explore the matter during negotiations and the contract fails to touch upon it, something more is required before the union will be held to have bargained away its rights, namely a *conscious relinquishment* by the union, clearly intended and expressed. [Emphasis supplied.]

Further, within this Board's *Perkins* decision, *International News Service* was distinguished, specifically, because it dealt with a labor organization's "express oral abandonment" during negotiations, relinquishing a broadly phrased demand for information, previously presented. More particularly, *International News Services* reveals: That the complainant labor organization therein had requested a *contractual* information clause; that the parties involved had actually bargained, *pro* and *con*, with respect thereto; that the Union's principal negotiator had "agreed to abandon" his proposed *contractual* information provision; that, concurrently, he had declared he was doing so because extensive data, which his proposed contractual provision would have required the concerned employer's management to produce, was no longer considered vital; and that the complainant labor organization had "consciously yielded" subsequently, when it finally negotiated a less comprehensive *contractual* information clause.

Herein, Respondent can point to no comparable bargaining history. Complainant Union's negotiators—first of all—never proposed a *contractual* provision which would have committed Respondent's Fremont management to provide requested materials lists. (On April 1, 1976, Vice President Wood of Complainant Union's parent International, had requested a complete "raw materials and chemicals" list, which would provide a mere *precursor* for prospective negotiations.)

Further, Complainant Union's request, though reiterated and presumably discussed during the parties' negotiations, was not considered, really, *pro* or *con*, on its merits; Respondent's principal negotiator twice requested its deferral, merely. And, when Borden, Incorporated's director of labor relations, subsequently, presented Respondent's purportedly "comprehensive" proposal, drafted to cover "all" health and safety matters, he did not—

so far as the record shows—clearly declare his possibly subjective view that it should be considered dispositive of both Vice President Wood's prior list request and Complainant Union's specific contract proposals. He may well have characterized Respondent's proposal as broadly purposed; Complainant Union's president, however, testified—credibly, within my view—that Complainant Union's negotiators did not consider McInerney's statement a bargaining gambit, whereby they were being solicited to drop their list request in exchange for Respondent's proposed contract clause.

Respondent's proffer, clearly, constituted a counterproposal, specifically calculated to cover Complainant Union's proposed "annual physical check-up" requirement, together with its previously drafted "Occupational Health and Safety" clause. While a witness, McInerney did declare that, when Respondent's proposal was presented, the "feeling . . . at [that] point" was that Complainant Union's demand for a complete materials' list would have to be relinquished. The record, however, warrants no determination that he so stated. With matters in this posture, no conclusion would be justified—within my view—that Complainant Union's negotiators were, expressly, given reason to believe they could no longer "hang tight" for a complete chemicals list, should they consider Respondent's proposed "Health and Safety" clause worthy of their concurrence.

Thus, clearly, Complainant Union's negotiators never really "consciously relinquished" their list request. Concededly, they never did so verbally; their mere silence, when confronted with McInerney's broadly descriptive statement regarding the scope of Respondent's counterproposal, certainly cannot be so construed.

Further, the record herein reflects no *conscious* concession, chargeable to Complainant Union's spokesmen, that they no longer considered a complete materials' list "essential or vital" with respect to their prospective contract's administration or Complainant Union's formulation of proposals looking toward future contract negotiations. See *Boston Record-American-Advertiser Division-The Hearst Corporation*, 115 NLRB 1095, 1105 (1956). Cf. *General Electric Company*, 173 NLRB 164, 165 (1968). Therein, this Board noted that:

> [T]he Union continuously and consistently asserted its statutory right . . . *prior* to the 1966 negotiations, *during* the negotiations, and *subsequent* to the negotiations. At no time during the negotiations did the Union indicate to Respondent that it was conceding on this point. [Emphasis supplied.]

In *General Electric*, consistently with these determinations, the Board found no waiver. Similar considerations, bottomed upon the present record, fully warrant a parallel determination, within my view, herein. Complainant Union's course of conduct, *prior to, during, and subsequent to the negotiations which produced the current contract between the parties*, will support no waiver determination.

7. Confidentiality of the information sought

With matters in this posture, Respondent suggests, finally, that "under the circumstances of this particular case" the firm's management should not be considered statutorily bound to provide Complainant Union's requested list. More particularly Respondent's counsel, within his brief, presses the following contention:

> Even, assuming *arguendo* that the information requested is relevant to the Union's intelligent functioning as bargaining representative of the employees, the information need not be disclosed because of its confidential, proprietary and trade secret nature, and the employer's legitimate business need that the information not be disclosed.

Upon this ground, Respondent seeks a determination, herein, that its refusal to provide Complainant Union with a complete materials' lists, limited to raw materials and chemicals stored, handled, and processed within the firm's Fremont plant, reflects no refusal to bargain, statutorily proscribed.

Responsively, within his brief, the General Counsel's representative contends: *First*, that Respondent's proffered trade secret claims cannot "privilege its refusal" with respect to furnishing relevant informaton, pursuant to request; *second*, that Respondent's defensive presentation demonstrates no certainty or likelihood of prejudicial trade secret disclosures, should Respondent provide Complainant Union's requested list; *third*, that, furthermore, reasonable arrangements may be made "through bargaining" calculated to accommodate both Complainant Union's right to receive relevant information, and Respondent's concern regarding some conceivably "undue" disclosure with respect to confidential, proprietary, trade secret data.

a. *Respondent's trade secret claim*

In civil litigation, a qualified right to protection against some compelled disclosure of trade secrets has long been recognized. 8 Wigmore, *Evidence* §2212 (3d Cir. 1940); Weinstein and Berger, *Weinstein's Evidence, Commentary on Rules of Evidence of the United States Courts and Magistrates*, Vol. 2, Art. V "Privileges," Sec. 508. Though never, thus far, defined by rule, recognized "trade secrets" have, conventionally, been considered to compass, *inter alia*, formulas, devices, or compilations of data, reasonably calculated to provide their possessor with some business advantage over competitors not cognizant with respect thereto. Both policy and logic suggest a broad concept's validity; trade secrets should, presumably, comprehend "all business data" calculated to guarantee possessors a better competitive position, with respect to which secrecy would, or could, substantially enhance value.

Herein, Respondent's defensive presentation, within my view, fully warrants a determination that Fremont's AC West and Printing Ink Division product lines do, indeed, compass various chemical formulations which may, frequently, depend upon "confidential, proprietary" trade secrets.

In this connection Respondent's associate director of quality assurance, Karl Drugge, credibly testified: That producers of both adhesive materials and printing ink compounds are notably competitive; that Respondent's management, therefore, continually strives—through research and development projects—to formulate products with a slight competitive edge, derived from reduced production costs or qualitative superiority; and that realized competitive advantages, frequently, derive from Respondent's usage of some material ingredient which Borden Chemical's competitors may not know about, or which they may be unable to procure, since the material's sole supplier may deal with Respondent, exclusively.

In this connection, further, Richard Palmer, Respondent's Printing Ink Division manager, testified—credibly and without contradiction—that, within his field, product superiority, with respect to such critical factors as print quality and color, adhesive capacity, and mar resistance, frequently derives from special ingredients within printing ink formulas, regarding which competitors may not be cognizant; that Respondent currently competes with some six different chemical companies to supply printing ink compounds for a particular beer producer's distinctive aluminum cans; that Fremont special "buff" color formula, which provides a concededly "brighter and more rich" color impression, required 6 months to develop; and that special ingredients therein, which Borden Chemical's management representatives believe its competitors lack, have enabled Respondent to capture some "extremely large portion" of the beer producer's business.

Further, Drugge declared, while a witness, that—within his field—some "six to fifteen" competitive chemical producers regularly strive to meet competition, or generate some competitive advantage, by developing "product matches" whereby qualified chemical engineers may determine the precise chemical composition of competitive products. Whenever successful product matches have been developed, chemical producers may consequentially "improve" their current formulas to equal their competitor's product, to develop comparable products with favorable price differentials, or to develop superior products with their own special materials. Frequently, the successful development of product matches, concerning a competitive item's formulation, will depend upon consciously managed or serendipitous discoveries, whereby special ingredients, present within a competitor's formulation, can be identified, copied, or surpassed.

Finally, Respondent's testimonial presentation—which I credit in this connection—reveals that Borden Chemical manufactures several products, within its Fremont plant, which require the incorporation of chemical compounds producted by outside suppliers, consistently with formulas which those suppliers, themselves, consider "confidential, proprietary" trade secrets.

Upon this record, Respondent's reliance on business data—specifically concerned with "the chemical and physical composition of substances" which its various manufacturing processes may require—calculated to promote or maintain its competitive position, with their value substantially enhanced by secrecy, cannot be gainsaid. Compare, *The Ingalls Shipbuilding Corporation*, 143 NLRB 712, 717, 742 (1963). Within his brief, the General Counsel's representative, indeed, proffers no contention that Respondent's claimed reliance on trade secrets should be considered specious.

b. *Respondent's measures to protect trade secrets from disclosure*

Respondent's management, determined to protect its trade secret formulas, currently takes several measures calculated to preserve the confidentiality of Fremont plant materials and production processes.

First, Respondent maintains posted shop rules, which plant workers may "possibly" be required to sign; violations are considered good cause for reprimand, demotion, suspension, or discharge, within management's discretion. These rules, among other things, proscribed all disclosures, with respect to conversations or information, to "unauthorized" persons, concerned with company "processes, equipment or business," without written permission. Further, production workers are forbidden to bring cameras into Respondent's plant without management's consent.

Second, Respondent's management and supervisory personnel, together with subordinate union member workers, must sign a "Trade Secrets Agreement" when hired. Therein signatories personnally commit themselves:

> . . . Not to use or divulge without BORDEN'S written consent, any confidential information acquired through his connection with BORDEN, including but not limited to, formulations, processing techniques, prices, customer lists and promotion plans.

The record, herein, suggests—though it may not positively reveal—Respondent's readiness to compel compliance with these commitments, or seek damages for their breach, through litigation should such action be required.

Third, measures have been devised to control plant access. People seeking entrance—save for certain outside service or maintenance personnel regularly performing routine services—must sign a central register book, and request permission to enter, from Fremont's works manager or his designee. Trucks requiring plant access, for pickups and deliveries, are regularly logged, both with respect to their ingress and egress.

Fourth, Respondent's trade secret formulas are kept in secured files, subject to release from the Fremont plant solely with "higher level" permission. Such formulas are marked "confidential" or "secret" when permitted to leave Respondent's plant. Any information concerned with product formulations, manufacturing process, plant equipment, and raw materials, together with other matters considered confidential—when transmitted between locations, within a Borden Chemical division—requires a laboratory manager's concurrence. When such data must be transmitted "outside" some particular division, the concerned division's general manager must signify his permission. Data transmitted by mail must carry a required "Secret" cover sticker or stamp.

Respondent may, sometimes, be required to provide Federal Government agencies with data, which manage-

ment representatives may consider trade secret information. Under certain circumstances, the recipient governmental bodies *must, pursuant to statute, perserve* such trade secret data's presumptive confidentiality.

Officially, I note—in this connection—the Occupational Safety and Health Act's requirement that "information reported to . . . the Secretary [of Labor] or his representative in connection with any inspection or proceeding" which contains or might reveal some trades secret "shall be considered" confidential. (29 U.S.C. Sec. 664.) Within his brief, Resondent's counsel, further, cites the Toxic Substances Control Act; Section 14 therein, he claims, provides, in relevant part, that "information reported to . . . the administrator . . . shall . . . not be disclosed" save in certain limited circumstances. See *Chrysler Corp.* v. *Brown*, 441 U.S. 281 (3d Cir. 1979), in this connection.

Further, I note—officially—that, whenever a Federal Government agency's preservation of confidentiality, with respect to reported data, cannot be considered specifically required by statute, the Freedom of Information Act, 5 U.S.C. Section 552(b)(4), nevertheless *permits* nondisclosure, with respect to "trade secrets" considered privileged or confidential.

With matters in this posture, the reasonableness of Respondent's concern for trade secret preservation, within my view, cannot be gainsaid.

(c) *The General Counsel's contention*

Within his brief, The General Counsel's representatives proffers no serious challenge, specifically with respect to Respondent's claim that—should it provide a complete "raw materials and chemicals" list pursuant to Complainant Union's request—some confidential trade secret information would inevitably be disclosed, thereby, and that such disclosures could conceivably injure the firm's competitive business position. Nevertheless, the General Counsel contends that Respondent's sweepingly generalized confidentiality claim "does not privileges its refusal" with respect to furnished relevant data. *The Ingalls Shipbuilding Corporation, supra* at 717. He cites analogous situations, wherein Board decisions reflect its rejection of contentions, proffered by concerned employers, that relevant information need not be furnished because of its confidential nature.

> Most of the General Counsel's cited cases, however, dealt with situations wherein concerned employers were claiming confidentiality with respect to specialized wage or salary data. One case considered the claimed confidentiality of customers' names.

Essentially, these Board decisions do reflect determinations that—under the circumstances present in these particular cases—demonstrated employer concerns with respect to confidentiality did not "outweigh" some labor organization's proper interest, with respect to pursuing a collective-bargaining objective, statutorily permitted.

The General Counsel's primary contention, however, must now be considered too broadly stated. See *Detroit Edison Company* v. *N.L.R.B.*, 440 U.S. 301 (1979). Therein, Justice Stewart, speaking for the Court, noted at 318 that:

> The Board's position [regarding the potential relevance of some particular worker's aptitude test scores] appears to rest on the proposition that union interests in arguably relevant information must always predominate over all other interests, however, legitmate. But such an absolute rule has never been established, and we decline to adopt such a rule here. . . .

Substantially, therefore, final determinations with respect to whether informational disclosures—pursuant to some labor organization's request—should be considered required, must now derive from this Board's consideration of competing interests; those interests, further, must be weighed with due regard for each case's particular circumstances. Some balanced judgment, required to determine whether and to what extent requested disclosures should be directed, may then be reached. (See Weinstein and Berger, *supra*, Vol. 2, Sec. 508–2 and 6, in this connection.)

(d) *The validity of Respondent's privilege claim*

In civil litigation, as previously noted, claims of privilege, proffered to preserve trade secrets, have never been given absolute recognition. Such claims have been recognized when, within a trier's view, their allowance will not tend to work injustice. See *Weinstein Evidence, supra.* Wigmore, likewise, describes the qualified nature of the privilege, though in somewhat less categorical terms. No privilege of secrecy, he declares, should be recognized if the rights of possibly innocent persons depend essentially or chiefly, for their ascertainment, upon the disclosure sought. (8 Wigmore, *Evidence* § 2212 (3d Cir. 1940.) Thus, persons claiming some necessity to keep particular matters secret should be expected to make secrecy's exigency particularly plain. More particularly, trade secret claimants may properly be required to demonstrate some likelihood of damage, should their purported secret's disclosure be directed.

Upon this record, however, Respondent's spokesman have not—within my view—persuasively demonstrated a claimed certainty or likelihood that their firm's trade secrets would be compromised, should the disclose of Fremont's various "materials and chemicals" be compelled pursuant to Complainant Union's list request.

Within his brief, Respondent's counsel does contend that, when confronted with Complainant Union's request, his client's designated representatives:

> . . . made known its position to the Union that it had no such list of raw materials and chemicals, and even if it did, because of the confidential, proprietary and trade secret nature of such information, *and the certain risk of public disclosure*, such a list would not be disclosed. [Emphasis supplied.]

Nothing in Respondent's testimonial presentation, however, dealt with the claimed "certainty" or "likelihood" of public trade secret disclosures. Respondent's witnesses

did declare—persuasively, within my view—that, should Borden Chemical's business competitors, somehow, become cognizant with respect to nothing more than their firm's complete "raw materials and chemicals" roster, its competitive position might conceivably be damaged. Their testimony, however, provided neither definitive forecasts, nor presumably informed speculation, regarding the method, manner, or circumstances under which such potentially prejudicial disclosures might, conceivably, reach Respondent's competition. The firm's "mere . . . assertion" that a list's submission to union representatives might "advantage" business competitors cannot defeat a right to disclosure of relevant information. See *The Kroger Company, supra* at 447, in this connection.

Mindful of this principle, I note that Complainant Union requested no formula disclosures; union representatives merely requested a complete materials inventory list. Compare *Sandee Manufacturing Co.* v. *Rohm & Haas Co.*, 24 F.R.D. 53 (N.D. Ill., 1959); therein, the disclosure of specific ingredients, within a purported "trade secret" substance, was directed, without a disclosure of the formula, pursuant to which they had been combined. Further, I note that Complainant Union's request—unlike demands for disclosure pressed by litigants in patent infringement cases, unfair competition cases, personal injury cases, and suits, for breach of warrantly—sought no disclosures before a trier of fact, for the public record, which Respondent's competitiors might rightfully peruse.

Respondent's witnesses, never specified whether they feared disclosure with respect to their complete materials' list, or merely with respect to some partial disclosure. They were not requested to describe whatever conceivable channels of prejudicial disclosure they were concerned about; nor were they requested to detail their speculations with regard to Complainant Union's possible rationale for consciously managed or permitted disclosures within Respondent's business community. They did not even discuss possibly "inadvertent leaks" which might—through some process never detailed for the record—reach Respondent's business competitors. See *The Ingalls Shipbuilding Corporation, supra* at 717 and 742, in this connection. This Board cannot presume some "certain risk of public disclosure" which Respondent has not, yet, persuasively demonstrated.

Conversely, the probability that Complainant Union's several "institutional interests" would, likely, militate against disclosures prejudicial to Respondent's competitive position may, reasonably, be deduced from the present record.

In *Detroit Edison, supra* at 2733, the Supreme Court noted this Board's brief references to various union institutional interests calculated to militate against disclosure, but, because of that case's procedural posture, their significance—particularly with reference to the Board's underlying determination, on balance, that the concerned labor organization's right to request and receive potentially relevant information should be confirmed—was not considered. The Court's decision reflects concern with the sufficiency of the Board's *remedial* directive, rather than its basic unfair labor practice determination.

In this connection, Complainant Union's longstanding, concededly amicable, relationship with Respondent's management should—first—be noted; union representatives would presumably, be loath to jeopardize that relationship by deliberately sanctioning "materials" list disclosures which might, conceivably, damage Respondent's competitive posture. Compare *Fawcett Printing Corporation*, 201 NLRB 964, 974 (1973). Rather, major cosiderations calculated to persuade Complainant Union's conformance with Respondent's desire to preclude potentially prejudicial disclosures may, reasonably, be considered present herein. Complainant Union must, consistently with its central function, represent Fremont plant workers responsibly, while maintaining a regular "ongoing" relationship with Respondent's management. Data disclosures—whether made directly to Respondent's competitors, or third parties deemed likely to transmit them—which Borden Chemical might consider calculated to facilitate some consequential "product match" tests which could, eventually, prejudice its competitive position, would clearly jeopardize Complainant Union's ability to represent Respondent's workers, effectively, thereafter.

For example: Bad-faith conduct, which Borden Chemical might consider chargeable to Complainant Union, could generate refusals by Respondent to comply with subsquent requests for similar information; clearly, this could adversely affect Complainant Union's general relationship with Respondent herein.

Likewise, logic suggests—more significantly—that Complainant Union would, most likely, derive no benefit from prejudicial disclosures to Borden Chemical's competitors, since job losses for union members, particularly within Respondent's Fremont plant, would probably result.

Further, nothing within the present record suggests that Complainant Union's members, their leadership, or their possible designees—receipts of Respondent's proffered data—would suffer temptations, likely to prompt prejudicial disclosures, because of conflicting loyalties to represented workers employed by Respondent's competitors. In short, no determinations, calculated to suggest some "clear and present danger" relative to breaches of trade secrecy, would be warranted herein. Compare *CBS Inc.*, 226 NLRB 537, 539 (1976), petition for review denied *sub nom. International Brotherhood of Electrical Workers, AFL–CIO* v. *N.L.R.B.*, 557 F.2d 995, 998–1000 (2d Cir. 1977) note particularly *N.L.R.B.* v. *David Buttrick Company*, 399 F.2d 505, 507 (1st Cir. 1968), and *Bausch & Lomb Optical Company*, 108 NLRB 1555 (1954), plus further cases cited within the Second Circuit's decision.

This Board has consistently held that concerned employers cannot refuse to bargain merely because their recognized collective-bargaining representative's negotiating team may include representatives of some labor organization which maintains contractual relations with *both* the concerned employer, and that firm's competitors. See *A.M.F. Incorporated-Union Machinery Division*, 219 NLRB 903, 904, 907 (1975); *Harley-Davidson Motor Co., Inc., AMF*, 214 NLRB 433, 437 (1974); *Roscoe Skipper, Inc.*, 106 NLRB 1238, 1240–42 (1953); compare *Inde-*

pendent Drug Store Owners of Santa Clare County, 170 NLRB 1699, 1702–03 (1968). Further, contentions that membership in a labor organization may be incompatible with a worker's duty of loyalty to his employer, particularly when that duty involves some responsibility to maintain confidentiality, have consistently been rejected. See *Dun and Bradstreet, Inc.*, 240 NLRB 162 (1979), citing 194 NLRB 9 and various other cases.

Finally, this Board's continuing authority, with respect to Complainant Union's affairs, should be noted; confronted with "evidence" suggestive of Complainant Union's responsibility for data leaks potentially destructive of trade secrecy, the Board could, conceivably, sanction or condone Respondent's future insistence with respect to maintaining confidentiality. And Complainant Union's capacity to perform its collective-bargaining functions, effectively, might thereby, conceivably, suffer some severe restriction.

The Supreme Court has declared that "[we] cannot assume that a union conducts its operations in violation of law." *Local 357, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America [General Electric Company]* v. *N.L.R.B.*, 365 U.S. 667, 676 (1961). Comparably, Respondent's presentation herein provides no logical or reasonable basis for indulging conceivable "assumptions" that Complainant Union's representatives would—deliberately—disclose Respondent's materials list to competitive firms, corruptly, or for invidious reasons. Compare *Cowles Communications, Inc.*, 172 NLRB 1909, 1910 (1968); therein, this Board foresaw "no less responsible handling of sensitive data" by union representatives than by concerned employers. Nor has any rational basis even been suggested for possible "assumptions" herein that Complainant Union would, inevitably, handle Respondent's materials list so cavalierly as to risk "accidental" disclosures.

(e) *Conclusions*

With matters in this posture, we confront, once more, the basic question—previously noted—which Respondent's defense presents: Should Borden Chemical's concern to preserve certain "confidential, proprietary, trade secret" chemical formulas—"under the circumstances of [this] particular case"—predominate over Complainant Union's proclaimed need for potentially relevant data, reasonably calculated to facilitate its proper discharge of representative functions, with respect to preserving and promoting workers' health and safety within the designated firm's Fremont plant? Upon the record, herein, that question, I conclude, merits a negative response.

More particularly, Respondent's contention—that its refusal to provide Complainant Union's requested "raw materials and chemicals" list should not be considered a statutorily proscribed refusal to bargain, because such a list's compelled submission, with its concomitant "certain risk of public disclosure" regarding various confidential, proprietary, and trade secret matters, would breach a recognized privilege—carries no persuasion. Respondent's professed concern to preserve confidentiality with respect to certain proprietary, trade secret data, should not be considered—*upon this record*—sufficiently legitimate and substantial to outweigh Complainant Union's contractually recognized concern with regard to potential health and safety hazards within Respondent's plant.

The request list's potential relevance or possible usefulness—particularly in connection with Complainant Union's statutorily recognized right to negotiate, and police, contractual provisions concerned with working terms and conditions—has previously, herein, been determined. Within my view, further, Complainant Union's proclaimed current "need" for such a complete plant materials and chemicals list been—despite Respondent's comprehensive, professionally mounted, denigratory presentation—sufficiently demonstrated. Concurrently, Respondent's suggestion, *contra*, that certain "confidential, proprietary" trade secrets would certainly be compromised—with some consequent damage to Borden Chemical's competitive position—should a list's submission consistent with Complainant Union's request be compelled, cannot reasonably be considered sustained.

In this connection, determinations have, herein, been reached: *First*, that Complainant Union sought no chemical formula disclosures, but merely a complete materials "inventory" list, from which—however—business competitors could, *conceivably*, derive "product matches" which might possibly facilitate challenges to Respondent's competitive leadership; *second*, that Respondent's witnesses, have proffered no testimonial or documentary showing sufficiently persuasive to warrant a factual conclusion that their required preparation of Complainant Union's requested list would prove unduly burdensome; *third*, that Complainant Union's representatives cannot, consistently with well-settled decisional doctrine, be required to seek potentially relevant, needed data, which Respondent could concededly provide, from alternative sources; *fourth*, that union representatives, confronted with the situation revealed within this record, could not, in any event, procure reliable "materials and chemicals" data, sufficient for their purpose, from such substitute sources; *fifth*, that Respondent's spokesmen, though professionally qualified, have failed to demonstrate, persuasively, any reasonable justification for their professed concern that a complete "materials and chemicals" list, delivered to union representatives, would be "certain" or "likely" to reach Respondent's business competitors; *sixth*, that, finally, Respondent's defensive presentation—considered in totality—suggests no reasonable likelihood of potentially prejudicial disclosures—consummated corruptly, through carelessness, or for invidious reasons—which might be chargeable to union representatives. Within my view, previously noted herein, no certainty or likelihood with regard to such damaging disclosures can legitimately be presumed.

Thus, on balance, having weighed the well-documented "competing interests" revealed within the present record, and having considered the total situation presented, I conclude that this Board's present recognition of Respondent's claimed "trade secret" privilege would not be warranted. Considered in conjunction, the Board's decisions teach that, before a concerned respondent's claimed "trade secret" defense can be recognized, respondent must—through a record showing—demonstrate, persuasively: *First*, that a legitimate business need

for confidentially exists; *second*, that the labor organization concerned has been advised, with regard to the firm's position; *third*, that the Union's request is overbroad, and its bargaining posture inflexible; *fourth*, that the concerned employer is willing, nevertheless, to make some effort to accommodate the labor organization's request, subject merely to reasonable restrictions or qualifications, necessary and proper to preserve confidentially. Herein, Respondent's record showing with respect to these several matters—within my view—has fallen short. Within his brief, the General Counsel's representative suggests:

> The information sought by the Union is clearly relevant to the employees' working conditions as well as their own personal health and welfare. It would be naive to believe that workers are not sophisticated enough to be genuinely concerned about their working environment, especially in the instant matter where it is undisputed that all the workers are exposed to a wide assortment of chemicals and other materials. Respondent's assertions that the existing safety procedures are sufficient or that it is willing to deal with specific problems when they arise [reveal] a disregard for the collective-bargaining process. [Interpolation supplied for purposes of clarity.]

While questioning neither Respondent's good faith nor its management's genuine concern with respect to preserving and promoting workplace health and safety, I concur. Upon this record, Respondent's refusal to provide Complainant Union with a requested list of raw materials and chemicals currently stored, handled, and processed within its Fremont plant, I find, constituted a refusal to bargain, statutorily proscribed.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

Respondent's course of conduct set forth in section III, above—since it occurred in connection with Respondent's business operations described in section I, above—had, and continues to have, a close, intimate, and substantial relation to trade, traffic, and commerce among the several States. Absent correction, such conduct would tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

In view of my previously stated findings of fact, and upon the entire record in this case, I make the following:

CONCLUSIONS OF LAW

1. Respondent, Borden and Chemical, a Division of Borden, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, as amended.

2. International Chemical Workers Union, Local No. 733, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act, as amended.

3. All production, warehouse, truck drivers, and maintenance employees, including working foremen who perform any production or maintenance work, employed by Borden Chemical, a Division of Borden, Inc., at 41100 Boyce Road, Fremont California facility; exclusive of executives, professional employees, office clerical employees, laboratory employees, other clerical employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act, as amended.

4. Since July 4, 1976, and continuing to date, Complainant Union has been the exclusive bargaining representative of employees of Borden Chemical, a Division of Borden, Inc., within the bargaining unit found appropriate herein, within the meaning of Section 9(a) of the Act, as amended.

5. By failing and refusing to provide Complainant Union with a complete list of raw materials and chemicals purchased, stored, and processed within its Fremont, California, facility, pursuant to request, Respondent has failed and refused to bargain collectively with Complainant Union herein. Respondent has, thereby, engaged in, and continues to engage in, unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, as amended.

6. The unfair labor practices specified affect commerce within the meaning of Section 2(6) and (7) of the Act, as amended.

REMEDY

Since I have found that Respondent committed, and has—thus far—failed to remedy, specific unfair labor practices which affect commerce, I shall recommend that it be ordered to cease and desist therefrom, and to take certain affirmative action, including the posting of appropriate notices, designed to effectuate the policies of the Act, as amended.

Specifically, I have found that Respondent violated the statute through its failure or refusal to supply Complainant Union with certain information. It will, therefore, be recommended—without qualification—that Respondent cease and desist therefrom, and supply Complainant Union, upon request, with the previously requested list of raw materials and chemicals which Respondent stores, handles, and processes within its Fremont, California, facility.

Should the Board conclude, nevertheless, that Respondent's concern for trade secrecy perservation, herein, constitutes a sufficiently "legitimate and substantial" concern, deserving of conditional protection, some qualifications—with respect to my remedial recommendation herein—might, conceivably, be considered warranted.

The nature of scope of those qualifications, however, should be determined with due regard for recognized limitation's on this Board's remedial discretion. In *Detroit Edison Company* v. *N.L.R.B.*, 440 U.S. 301, previously noted herein, Justice Stewart, speaking for the Supreme Court, declared at 314 that:

> A union's bare assertion that it needs information to process a grievance *does not automatically oblige the employer to supply all the information in the manner requested.* The duty to supply information

> under § 8(a)(5) turns upon "the circumstances of the particular case," *N.L.R.B.* v. *Truitt Mfg. Co.*, 351 U.S. [149], 153, *and much the same may be said for the type of disclosure that will satisfy that duty.* See, e.g., *American Cyanamid Co.*, 129 NLRB 683, 684 (1960). . . . The finding by the Board that [the Company's concern for test secrecy] did not outweigh the Union's interest in exploring the fairness of the Company's criteria for promotion did not carry with it any suggestion that the concern itself was not legitimate and substantial. . . . *The Board has cited no principle of national labor policy to warrant a remedy that would unnecessarily disserve this interest,* and we are unable to identify one. [Emphasis supplied.]

Having determined that, despite the Board's statutory "refusal to bargain" finding, the public utility respondent's concern for test secrecy was both legitimate and substantial, Justice Stewart concluded that this Board's purportedly remedial directive provided no "adequate" protection for that firm's "undisputed and important interests" regarding the preservation of secrecy with respect to certain psychological test materials. Respondent therein had, *previously*, volunteered to submit certain data, which the concerned labor organization had requested, to some professional qualified union designee. Consistently, therewith, this Board's Administrative Law Judge had recommended a qualified remedial directive; he suggested that some data, which complainant union therein had requested, should be disclosed solely to a chosen "expert" intermediary. His recommendation, however, had not been grounded in consideration for Detroit Edison's proclaimed concern regarding secrecy perservation. The Board had, nevertheless, directed that firm's management to supply specifically requested data *directly to Union representatives,* subject to certain "protective" restrictions on their use of such supplied materials, calculated to protect the firm's interest with respect to preserving the requested data's secrecy. With matters in this posture, the Supreme Court—though not called upon to determine whether the concerned employer's refusal to provide requested information flouted a statutory duty—held, for various reasons, that this Board's purportedly protective restrictions, calculated to preclude prejudicial disclosures provided "scant protection" for *Detroit Edison's* clearly "legitimate and substantial" secrecy interests; that the Agency had, nevertheless, provided "no justification" for its purportedly restricted remedy; and that it had thereby "abused its remedial discretion" when it ordered the respondent before it to deliver certain data *directly* to union representatives.

Should the Board, then, consider Respondent's concern for trade secret preservation, upon this record, sufficiently "legitimate and substantial" to warrant some protection—*despite my determination, previously noted, that no "certain risk" with respect to potentially prejudicial trade secret disclosures detrimential to Borden Chemical's competitive position has been, persuasively, demonstrated herein*—some qualification of conventional remedial directives, consistent with the Supreme Court's *Detroit Edison* decision, would seem both warranted and necessary. Clearly, however, purportedly protective "use" restrictions—set forth within a Board remedial order specifically calculated to bar Complainant Union from taking any action which might permit trade secret data to fall into the hands of Respondent's business competitors—will not suffice.

In that connection: This Board has never required, routinely, that potentially relevant data should be furnished precisely in conformity with a labor organization's request. The *Ingalls Shipbuilding Corporation, supra* at 718. Rather, within its remedial discretion, the Board has, frequently, described some particular "form and manner" pursuant to which concerned employers will be required to provide relevant data; certainly, the Board may, likewise, condition a labor organization's right of access with respect thereto. Compare *The Detroit Edison Company*, 218 NLRB 1024 (1975). In most cases, remedial directives—thus qualified—have reflected this Board's concurrence with particular limitations or conditions, considered reasonably, which concerned employers had, previously, laid down. Nevertheless, the Board's power, within its concededly "broad" discretion, to devise conditional remedies, *sua sponte*, cannot be doubted.

Eighteen years ago, this Board held that a respondent firm, confronted with a labor organization's "adamant insistence . . . on its right to have . . . records" furnished precisely in conformity with its prescribed terms, which—nevertheless—refused to provide the broad spectrum of data demanded, because it wished to protect its property rights in certain purportedly unique manufacturing techniques and processes, described therein, committed no refusal to bargain, statutorily proscribed. *American Cyanamid Company, supra* at 684. Within its decision, the Board suggested that:

> . . . the problem of establishing the conditions under which access to [relevant data] may be afforded the Union in a manner satisfying both its legitimate interest in the wage information [therein] contained . . . and those of the Respondent in protecting certain other aspects of these records against the risk of publicity . . . [should properly] be resolved at the bargaining table. . . .

However, 3 years later, when confronted with a comparable situation, the Board—having *found that a respondent firm had not substantiated its claim that certain relevant data was properly considered "highly" confidential, and that such data's disclosure would injure its competitive business position*—directed that firm to furnish complainant labor organization therein, upon request, with all "pertinent" data. *The Ingalls Shipbuilding Corporation, supra* at 718. In that connection, the Board declared:

> . . . Respondent believes that the rate books contain [nonrelevant] business information . . . . it may make the relevant wage data available to the Council in some other fashion. *We leave it to the good faith of the parties, now that* Respondent has been clearly apprised that it must supply [relevant] data . . . to determine between themselves the conditions under which the Council's right of access to

> such data may be accommodated to the Respondent's proper concern not to have business information of a confidential character revealed to its competitors. [Emphasis supplied. Interpolations provided to promote clarity.]

Comparably, this Board, charged with a responsibility to provide remedies congruous with policy, could—conceivably—decided to qualify its mandate, herein, with similar precatory language. Or, perhaps, Respondent's management could be *required* to bargain collectively with Complainant Union's representatives, upon request, concerning some "mutually satisfactory terms" pursuant to which Respondent would, finally, concede its willingness to provide a complete raw materials and chemicals list. To date, Respondent's purely negative replies—when confronted with Complainant Union's repeated requests—have provided union representatives neither with "guides" which might help them frame some qualified request, possibly hedged with promissory safeguards, nor with "incentives" to do so, bottomed upon expectations that such a qualified request would be honored. Compare *Fawcett Printing Corporation*, 201 NLRB 964, 975 (1973). Thus, Complainant Union herein cannot—properly—be charged, yet with "adamant insistence" concerning its right to request and receive Respondent's material list without proffering some reciprocal commitments calculated to preclude such a list's prejudicial dissemination. Compare *Detroit Edison Company* v. *N.L.R.B., supra*. The parties, thus far, have never considered whether they could negotiate "mutually satisfactory terms" pursuant to which potential disclosures prejudicial to Respondent's trade secret formulas might be forestalled. Clearly, this Board can—should it so choose—suggest or mandate further discussion, calculated to produce a mediatory consensus, in that regard.

In short, with matters in their present posture, *arguendo*, some possible determination regarding the necessity or propriety of a qualified remedy, herein, may merit Board consideration. For reasons previously noted, however, my remedial recommendations will be confined to conventional directives, which are fully warranted, within my view, upon the present record.

[Recommended Order omitted from publication.]